TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 69.

ELIJAH S. ALVORD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 3, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 69.

ELIJAH S. ALVORD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	11	8
Final judgment	13	8
Finding of facts by the court	14	8
Requests for findings by plaintiff	16	10
Requests for findings by defendants	19	11
Opinion	21	11
Motion for new trial	22	12
Motion for appeal	23	12
Motion for new trial overruled	25	13
Allowance of appeal	25	13
Clerk's certificate	26	13

1 Court of Claims.

Petition.

ELIJAH S. ALVORD
against
THE UNITED STATES.

To the honorable judges of the Court of Claims of the United States of America:

Your petitioner, Elijah S. Alvord, states that he is a citizen of the United States of America, and resides in the city of Indianapolis, in the State of Indiana, and is the original owner of the claim herein set forth, and that he has, at all times, borne true allegiance to the Government of the United States, and that he has not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

And your petitioner respectfully represents that heretofore, to wit, on the 26th day of July, 1858, at the city of Washington, District of Columbia, he entered into a written contract with the United States of America, (the said United States acting in that behalf by their Postmaster-General,) which said contract was sealed and delivered between the said parties on the day and year aforesaid, and by which your petitioner contracted to transport the mail on route No. 10942, from Iowa City, Iowa, by Capi, Oxford, Homestead, Marengo, Downard, Victor, Bear Creek, Grinnell, North Skunk River, Pleasant View, Newton, Apple Grove, and East Des Moines, to Des Moines and back, six times a week, in four-horse coaches, for and during the term commencing the first day of July, 1858, and ending with the 30th day of June, 1862, said mail to be carried within the times fixed in the schedule of departures and arrivals annexed to said contract, until said schedule should be altered by the authority of the Postmaster-General of the United States, as in said contract provided, and then to carry according to said altered schedule.

And your petitioner did undertake, covenant, and agree with the United States to carry said mail in a safe and secure manner,
2 free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion if its weight and bulk should require it; and also to take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that might thereafter be established on the route, and into the post-office at each end of the route, and into the post-office at the place where the carrier stopped at night, if one was kept there; and if no office was kept there, to lock it up in some secure place at the risk of the contractor; and also to convey, without additional charge, post-office blanks, mail-bags, and the special agents of the Department, on the exhibition of their credentials.

And it was further stipulated and agreed in and by said contract that the Postmaster-General might alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers should be rendered necessary, the contractor being at liberty, in case of increased expedition, to relinquish the contract on timely notice, if he should prefer it to the change.

And the United States covenanted and agreed with your petitioner to pay him, in consideration of his services under said contract, the sum of nine thousand three hundred and seventy-five dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters on the route, or otherwise, at the option of the Postmaster-General of the United States.

And it was further stipulated and agreed that said contract should, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the 21st of April, 1808, entitled "An act concerning public contracts."

And your petitioner further represents that on the 24th of April, 1858, at Washington aforesaid, he entered into another contract in writing with the United States of America, (the said United States acting in that behalf by their Postmaster-General,) which said contract was sealed and delivered between the said parties on the day and year last aforesaid, and by which your petitioner contracted to transport the mail on route No. 11047, from Des Moines, Iowa, by Boone, Adeil, Wiscotta, Morrisburg', Bear Grove, Hamlin's Grove, Lura, Pyneosa, Turkey Grove, Lewis, and Macedonia, to Council Bluffs and back, three times a week, in four-horse coaches, (supplying Wiscotta, Pyneosa, and Turkey Grove by side mail,) with certainty, celerity, and security, using therefor such means as might be necessary to transport the whole of said mail, whatever might be its size or weight, for and during the term commencing the 1st day of July, 1858, and ending with the 30th day of June, 1862; said mail to be carried within the time fixed in the
3 schedule of departure and arrivals annexed to said contract, and so to carry until said schedule should be altered by the authority of the Postmaster-General of the United States, as in said contract provided, and then to carry according to said altered schedule.

And your petitioner did undertake, covenant, and agree with the United States to carry said mail in a safe and secure manner, free from wet or other injury, under a sufficient oil-cloth or bear-skin, if carried on horse, or in a boot under the driver's seat, if carried in a coach or other vehicle, and in preference to passengers, and to their entire exclusion if its weight and bulk should require it, and also to take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that might thereafter be established on the route, and into the post-office at each end of the route, and into the post-office at the place at which the carrier stopped at night, if one was kept there; and if no office was kept there, to lock it up in some secure place, at the risk of the contractor; and also to convey, without additional charge, post-office blanks, mail locks and bags, and the special agents of the Department, on the exhibition of their credentials, if a coach or other suitable conveyance was used.

And it was further stipulated and agreed in and by said contract that the Postmaster-General might alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers should be rendered necessary; the contractor being at liberty, in case of increased expedition, to relinquish the contract on timely notice, if he should prefer it to the change.

And the United States covenanted and agreed with your petitioner to pay him, in consideration of his services under said contract, the sum of seven thousand two hundred and forty-five dollars a year, to wit, quarterly, in the months of May, August, November, and February,

through the postmasters on the route, or otherwise, at the option of the Postmaster-General of the United States.

And it was further stipulated and agreed that said contract should, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the 21st of April, 1808, entitled "An act concerning public contracts."

And your petitioner further represents that on the 24th day of April, 1858, at Washington aforesaid, he entered into another contract in writing with the United States of America, (the said United States acting in that behalf by their Postmaster-General,) which said contract was sealed and delivered between the said parties on the day and year last aforesaid, and by which your petitioner contracted to transport the mail on route No. 11087, from Council Bluffs, Iowa, to Omaha
4 City, Nebraska Territory, and back, six times a week, in four-horse coaches, with certainty, celerity, and security, using therefor such means as might be necessary to transport the whole of said mail, whatever might be its size or weight, for and during the term commencing the 1st day of July, 1858, and ending with the 30th day of June, 1862, said mail to be carried within the time fixed in the schedule of departures and arrivals annexed to said contract, and so to carry until said schedule should be altered by the authority of the Postmaster-General of the United States, as in said contract provided, and then to carry according to said altered schedule.

And your petitioner did undertake, covenant, and agree with the United States to carry said mail in a safe and secure manner, free from wet or other injury, under a sufficient oil-cloth or bear-skin, if carried on horse, and in a boot under the driver's seat, if carried in a coach or other vehicle, and in preference to passengers, and to their entire exclusion if its weight and bulk should require it; and also to take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that might thereafter be established on the route, and into the post-office at each end of the route, and into the post-office at the place at which the carrier stopped at night, if one was kept there; and if no office was kept there, to lock it up in some secure place, at the risk of the contractor; and also to convey, without additional charge, post-office blanks, mail locks and bags, and the special agents of the Department, on the exhibition of their credentials, if a coach or other suitable conveyance was used.

And it was further stipulated and agreed in and by said contract that the Postmaster-General might alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers should be rendered necessary; the contractor being at liberty, in case of increased expedition, to relinquish the contract on timely notice, if he should prefer it to the change.

And the United States covenanted and agreed with your petitioner to pay him, in consideration of his services under said contract, the sum of three hundred dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters on the route, or otherwise, at the option of the Postmaster-General of the United States.

And it was further stipulated and agreed that said contract should, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the 21st day of April, 1808, entitled "An act concerning public contracts."

And your petitioner further represents that on the 12th day of May, 1858, at Washington aforesaid, he entered into another contract
5 in writing with the United States of America, (the said United States acting in that behalf by their Postmaster-General,) which said contract was sealed and delivered between the said parties on the day and year last aforesaid, and by which your petitioner contracted to transport the mail on route No. 14005, from Omaha City, Nebraska Territory, by Elkhorn City and Buchanan, to Columbus and back, three times a week, in two-horse coaches, for and during the term commencing the first day of July, 1858, and ending the 30th day of June, 1862; said mail to be carried within the times fixed in the schedule of departures and arrivals annexed to said contract, and so to carry until said schedule should be altered by the authority of the Postmaster-General of the United States, as in said contract provided, and then to carry according to said altered schedule.

And your petitioner did undertake, covenant, and agree with the United States to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion if its weight and bulk should require it; and also to take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that might thereafter be established on the route, and into the post-office at each end of the route, and into the post-office at the place at which the carrier might stop at night, if one was kept there; and if no office was kept there, to lock it up in seme secure place, at the risk of the contractor; and to receipt for mail-bags, and convey way-bills enumerating and describing the same, if requested to do so; and also to convey, without additional charge, post-office blanks, mail-bags, and the special agents of the Department, on the exhibition of their credentials.

And it was further stipulated and agreed in and by said contract that the Postmaster-General might alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increased speed, if the employment of additional stock or carriers should be rendered uecessary; the contractor being at liberty, in case of increased expedition, to relinquish the contract on timely notice, if he should prefer it to the change.

And the United States covenanted and agreed with your petitioner to pay him, in consideration of his services under said contract, the sum of four thousand two hundred and fifty dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters on the route, or otherwise, at the option of the Postmaster-General of the United States.

And it was further stipulated and agreed that said contract should, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the 21st day of April, 1808, entitled "An act concerning public contracts."

6 And your petitioner further represents that on the 4th day of September, 1858, at Washington aforesaid, he entered into another contract in writing with the United States of America, (the said United States acting in that behalf by their Postmaster-General,) which said contract was sealed and delivered between the said parties on the day and year last aforesaid, and by which your petitioner contracted to transport the mail on route No. 14046, from Columbus, Nebraska Territory, by Monroe and Grand Island City, to Fort Kearney and back, three times a week to Monroe, and once a week the residue, in four-mule

covered spring-wagons, and with six mules if the weight of the mail should require it, and to carry the entire mail with a suitable guard, &c., for and during the term commencing the first day of October, 1858, and ending with the 30th day of June, 1862; said mail to be carried within the times fixed in the schedule of departures and arrivals annexed to said contract, and so to carry until said schedule should be altered by the authority of the Postmaster-General of the United States, as in said contract provided, and then to carry according to said altered schedule.

And your petitioner did undertake, covenant, and agree with the United States to carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers, and to their entire exclusion if its weight and bulk should require it; and also to take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that might thereafter be established on the route, and into the post-office at each end of the route, and into the post-office at which the carrier stopped at night, if one was kept there; and if no office was kept there, to lock it up in some secure place, at the risk of the contractor; and also to convey, without additional charge, post-office blanks, mail-bags, and the special agents of the Department, on the exhibition of their credentials.

And it was further stipulated and agreed in and by said contract that the Postmaster-General might alter the contract, and alter the schedule, he allowing a pro rata increase of compensation, within the restrictions imposed by law, for the additional service required, or for the increase of speed, if additional stock or carriers should be necessary; the contractor being at liberty, in case of increased expedition, to relinquish the contract on timely notice, if he should prefer it to the change.

And the United States covenanted and agreed with your petitioner to pay him, in consideration of his services under said contract, the sum of nine thousand nine hundred and eighty-nine dollars a year, to wit, quarterly, in the months of May, August, November, and February, through the postmasters along the route, or otherwise, at the option of the Postmaster-General of the United States.

7 And it was further stipulated and agreed that said contract should, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the 21st April, 1808, entitled "An act concerning public contracts."

Your petitioner further represents that the routes embraced in the foregoing contracts from Marengo, Iowa, to Fort Kearney, Nebraska Territory, constituted one continuous route about four hundred and ninety miles in length, and, according to the terms and conditions of said contracts, your petitioner was to transport the mail over about one hundred miles of said route six times a week, in four-horse coaches; over about one hundred and forty-eight miles of said distance three times a week, in four-horse coaches; over about eighty-two miles of said distance three times a week, in two-horse coaches; and over the remaining one hundred and sixty miles of said distance once a week, in four-mule coaches.

He further states that immediately after he had entered into said contracts he purchased all the horses, mules, coaches, and wagons which were necessary to enable him to fulfil his said contracts and to perform all the service and duties imposed and required by said contracts, put them upon the routes designated in said contracts, employed the requi-

site number of drivers, &c., and began and continued the transportation of the mails over said routes, complying, in all things therewith connected, with the terms and conditions of his said contracts to the entire satisfaction of the Postmaster-General of the United States.

He further states that when he entered into the said several contracts the great overland California mail was transmitted from the Atlantic to the Pacific States via Toledo, Ohio, to Quincy, Illinois, and thence by the Hannibal & S't Joseph Railroad, and that no part of it passed over the routes embraced within the aforesaid contracts of your petitioner, and that all the mail-matter at that time forwarded by the routes included in his contracts could be and was easily carried in the boot of the coach under the driver's seat, as provided in said contracts; and it was not then supposed that the natural increase of population and business during the time said contract had to run would call for any additional or increased means or facilities of mail-transportation over said routes to those provided for in said contracts, and but for the circumstances hereinafter mentioned no additional means or facilities for transportation of mail-matter over said routes would have been necessary, or demanded, during the continuance of said contracts.

Your petitioner further represents that whilst he was engaged in the transportation of the mails over the routes aforesaid, in compliance with his contracts aforesaid, to wit, on the 16th day of September, 1861, the
8 Postmaster-General, in consequence of the interruption of travel over the Hannibal & S't Joseph Railroad, caused by the rebellion then existing in Missouri, ordered, directed, and caused all the overland and California mails, which were then being sent by Toledo, Ohio, via the Wabash Valley Railroad to Quincy, Illinois, and thence by the Hannibal & S't Joseph Railroad, to be sent from Chicago via Davenport, Iowa, as far as Marengo by railroad, and beyond Marengo in coaches over the routes embraced in your petitioner's said contracts to Fort Kearney, the junction with the great overland mail route; and, in obedience to said orders and instructions, the overland and California mails from Boston, New York, Philadelphia, Washington, Baltimore, Buffalo, Pittsburgh, and Chicago were sent over the routes in your petitioner's said contracts from the said 16th day of September, 1861, till the 1st of January, 1862, and transported over said routes by your petitioner, instead of being sent as theretofore to Quincy, Illinois, and thence by the Hannibal and S't Joseph Railroad.

He further states that the additional mail-matter thus thrown upon his routes, and which he was required to and did transport daily from Marengo, Iowa, west to Fort Kearney, Nebraska Territory, and from Fort Kearney east to Marengo, amounted to from thirty to forty sacks per day, weighing from 1,500 to 3,000 pounds, all of which he transported daily over the entire distance between said places; and to enable him to perform said service he was compelled to and did purchase a large additional number of horses and coaches, and employ an additional number of drivers at a large outlay of money; that during the time he was performing this extra service the roads were very bad; that this additional service was thrown upon him without previous notice, and had to be instantly provided for; and, including the additional stock he was obliged to purchase, and the overworking of all his stock, (having to run during the entire time, from the 16th of September to the first of January, not less than ten extra coaches per week,) it cost him not less than three hundred dollars per day to perform the extra and additional service required of him in transporting the said overland and California mails. The freight of which said extra mails consisted, if

charged at the regular price charged to individuals for the transportation of freight, would have amounted to about the sum of eight hundred dollars per day.

He further states that if he were paid for this extra service at the same rate which the Overland Mail Company was paid by the Government under its contract with said company for transporting the same mail, his compensation would amount to over eighty thousand dollars.

Your petitioner further states that he transported said mails, as above stated, by the order and direction, and at the request of the Postmaster-General of the United States, and for the United States, and upon the implied understanding and agreement that he should be paid
9 therefor what said services were reasonably worth; and he avers that said services so performed by him at the special instance and request of the United States, and for the benefit of the said United States, were reasonably worth, and that he deserves to have therefor, the sum of thirty-five thousand one hundred dollars, no part of which has yet been paid him; but the said United States have heretofore refused and still do refuse to pay him the same, or any part thereof, to his great injury and oppression.

And your petitioner further represents that heretofore, to wit, some day in January or February, 1865, he presented his account for the services aforesaid to the Postmaster-General of the United States, and adduced his proofs in support thereof and demanded payment of the same, but the said Postmaster-General, acting for and on behalf of the United States, refused to allow or pay any part of said account, and the whole thereof remains unpaid.

And your petitioner files herewith his account against the United States for the services aforesaid, amounting to the said sum of $35,100, and prays that it may be taken and considered as a part of this petition; and that his said claim may be investigated and allowed, and that he may have relief according to law and equity; and, as in duty bound, he will ever pray, &c.

BROWNING & EWING,
Washington, D. C., Counsel for Petitioner.

Post-office address of the claimant: Indianapolis, Indiana.

STATE OF INDIANA,
County of Marion, sct:

Elijah S. Alvord, the claimant in the foregoing petition, being first duly sworn, deposeth and saith that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that said claimant is justly entitled to the amount in this petition claimed from the United States of America, after allowing all just credits and off-sets, and that he believes the facts stated in said petition are true.

ELIJAH S. ALVORD.

STATE OF INDIANA,
Marion County, ss:

Before me, the undersigned, a notary public in and for said
10 county, personally appeared the above-named Elijah S. Alvord, who, being by me first duly sworn, deposeth that the above statement is true, to the best of his knowledge and belief.

J. J. HAYDEN,
Notary Public.

INDIANAPOLIS, INDIANA, *August 1st*, 1865.

U. S. Government to E. S. Alvord, D'r.

To transporting overland mail between Marengo, Iowa, and Fort

Kearny, Nebraska, 430 miles, from *from* September 6th, 1861, to January 1st, 1862.
117 days, at $300 per day.....$35,100.

(Endorsed:) Filed August 21, 1865.

11 *Traverse.*

In the United States Court of Claims, October term, A. D. 1865.

THE UNITED STATES }
vs.
ELIJAH S. ALVORD. }

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein; and not confessing the same, or any part thereof, doth hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And to so much of the said petition as sets forth & avers that the United States is indebted to said claimant in the sum of thirty-five thousand one hundred dollars, the defendants say that they are
12 not indebted to said claimant in said sum of money, nor any part thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

(Endorsed:) Filed Sept. 5, 1865.

13 *Final judgment.*

(Extract from minutes.)

WASHINGTON, *Monday, May* 18, 1874.

The court met according to adjournment.

Present: Charles D. Drake, ch. justice; Edward G. Loring & Charles C. Nott, judges.

* * * * * * *

ELIJAH S. ALVORD }
vs.
THE UNITED STATES. }

Judge Loring announced the decision of the court, and judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

Judge Nott filed a dissenting opinion.

14 United States Court of Claims.

ELIJAH S. ALVORD }
vs.
THE UNITED STATES. }

Findings of fact by the court.

I. In 1858 the Postmaster-General entered into five written contracts

with the claimant for the transportation of the mail between Iowa City and Fort Kearney. Between Iowa City and Des Moines the service was to be performed six times a week each way by four-horse coaches; between Des Moines and Council Bluffs three times a week by two-horse coaches; between Council Bluffs and Omaha six times a week in four-horse coaches; between Omaha and Columbus three times a week by two-horse coaches; between Columbus and Fort Kearney once a week by four-mule covered spring-wagon.

And each of these contracts contained the following provisions, requiring the contractor—

"To carry said mail in a safe and secure manner, free from wet or other injury, in a boot under the driver's seat, and in preference to passengers and to their entire exclusion if its weight and bulk require it.

"To take the mail and every part of it from, and deliver it and every part of it at, each post-office on the route, or that hereafter may be established on the route, and into the post-office at each end of the route."

On the 25th July, 1861, while these contracts were still in force, the claimant offered, in writing, "to improve the service from Omaha to Kearney City," which had been substituted for Fort Kearney as the terminus, "for $14,000 additional per annum," and the Postmaster-General, on the 26th July, 1861, ordered, by an endorsement on the original contracts, that the service between Omaha and Kearney City be increased to a daily service, and that the claimant be allowed "$14,000 additional per annum, to take effect from the date of its commencement." This additional service began on the 5th August, 1861.

II. On the 16th September, 1861, in consequence of the route established by Congress for the through California mail having been broken by the burning of bridges, the Postmaster-General ordered the California mail to be sent over claimant's routes; and the claimant transported it under and in pursuance of such order from the 16th September to the 25th December, 1861. It greatly exceeded in bulk the other mail-matter which the claimant transported under his contracts, and on some of his routes required for its conveyance at times as many as five coaches per day in addition to the one coach which he would otherwise have run, and it at all times and on all of his routes required one or more additional coaches which were used exclusively for it, and the fair and reasonable value of the service for the period named was the sum of $35,100.

15 III. Immediately after the claimant's services for carrying the California mail, as set forth in the second finding, had terminated, he presented his account therefor to the Postmaster-General, and requested that it be liquidated and paid, but the Postmaster-General refused to allow or pay the same, and directed the Second Assistant Postmaster-General to reply "that when he made the arrangement to give him the $14,000 per annum additional for improved service between Columbus and Fort Kearney, it was in view of his conveying the overland mails over that route and through Iowa free of additional expense should circumstances make it necessary temporarily so to send them; and that if the claim for additional compensation for such service is to be pressed, he would feel compelled at once to annul that arrangement." The Second Assistant Postmaster-General reduced such instructions to writing, in the form of a letter from himself to the claimant, and caused it to be mailed to the claimant at his residence, in Indianapolis, Indiana. Subsequent to the mailing of such letter, and while the additional mail-service at $14,000 per annum was still being rendered, the claimant presented documents to prove the justice of his claim for con-

veying the California mail, and otherwise pressed his demand by personal interviews with the Second Assistant Postmaster-General, with whom all of the business relating to this claim had previously been transacted. He did not otherwise notify the Postmaster-General that his claim for the California mail-service would be pressed. The Second Assistant Postmaster-General did not inform the Postmaster-General that the claimant thus pressed his demand for the California mail-service. The claimant continued to run a daily mail between Omaha and Fort Kearney, and to receive the consideration at the rate of $14,000 per annum, from the 12th of February, 1862, when the Postmaster-General's decision was made, up to the termination of the original contract on the 30th June, 1862.

16 *Plaintiff's request for finding of facts.*

In Court of Claims.

ELIJAH S. ALVORD
vs. } 2170.
THE UNITED STATES.

The plaintiff asks the court to find the following facts in addition to those already found and certified:

1. That the mail-service performed by the plaintiff upon the routes mentioned in finding 1, made by the court, made a continuous line 433 miles in length, for which the compensation amounted to $45,159 per annum.

Endorsed by the court, "Allowed."

2. That in the making of the contracts and arrangements men-
17 tioned in finding 1 the circumstances at the time were such that it was neither understood or contemplated by the parties that the overland California mail should be carried over or upon either of the plaintiff's mail-routes.

Endorsed by the court, "Allowed."

3. That save and except the period of time mentioned in finding 2, the California overland mail was transported by rail via Quincy, Ill's, to S't Joseph, Mo., and Atchison, Kansas, and from thence by coach to Placerville, & the compensation allowed at that time for carrying the same, for that part of the service performed by coach, was at the
18 rate of $4.75 per mile per annum.

Endorsed by the court, "Allowed."

4. The orders of the Postmaster-General, turning the California overland mail over and upon the plaintiff' routes, as mentioned in finding 2, were in writing.

Endorsed by the court, "Allowed."

5. During the period of time these *these* transactions the Second Assistant Postmaster-General was, by virtue of his office, at the head and in charge of the Contract Bureau of the Post-Office Department.

Endorsed by the court, "Allowed."

THOMAS WILSON,
Attorney for Plaintiff.

(Endorsed:) Filed May 7, 1874.

19 *Defendant's request for finding of effects.*

U. S. Court of Claims.

E. S. ALVORD
vs. } 2170.
THE UNITED STATES.

Request for findings.

And now comes the Attorney-General, on behalf of the United States, and requests the following findings of fact by the court:

1. That the Postmaster-General knew of the interruption of the overland mail on the 17th day of July, 1861, by armed rebels.
Endorsed by the court, "Refused as irrelevant."

2. That the claimant presented on January 20, 1862, a claim
20 for additional compensation amounting to $23,400 for additional service; that is, carrying the overland mail from Sept. 16 to Dec. 25, 1861.
Endorsed by the court, "Refused as irrelevant."

3. That the letters of February 25th and 27th, 1862, from postmasters and route-agents were received through the mails by the Second Assistant Postmaster-General.
Endorsed by the court, "Refused as not sustained by evidence."

JOHN GOFORTH,
Ass't Att'y-Gen'l.

(Endorsed:) Filed May 7, 1874.

21 LORING, J., delivered the opinion of the court:

When this case was heard before it was considered that the claimant was barred of his claim because after the Postmaster-General had decided that the extra mail-service would be discontinued if the petitioner persisted in his claim, he had acceded to that by performing the extra service and receiving the money for it without protest. A rehearing was granted to the petitioner to permit him to show such protest, and he has submitted evidence for the purpose. But we think it fails to prove it, and that it shows his attempts to induce the postmaster to change his decision, while the petitioner was all the time acting on it in performing the extra service and receiving the compensation for it, which he knew would not have been paid to him if his claim had not been abandoned and understood to have been.
The petition is dismissed.

NOTT, J., dissenting:

On the former trial the evidence indicated a complete and absolute acquiescence on the part of the contractor in the decision of the Postmaster-General, from which acquiescence we were bound to infer that he was in good conscience estopped from again pressing his claim. The benefit received by the contractor from his silence, we then pointed out, was exceedingly trivial as compared with the magnitude of the claim, which he apparently consented to relinquish. It now appears that after the notice was given by the Postmaster-General the claimant did, in

fact, continue to press his claim. Coupled with the other facts of the case I think that he did not intend to keep silence, or to be considered as keeping silence, and that he was neither morally nor legally bound to give any formal notification to the Postmaster-General, or to do anything more than that which he did do, namely, to continue pressing his claim for the California mail-service. It is one of those cases where the law does not allow an estoppel to be implied; where the burden of proof rests exclusively upon the party who relies upon the estoppel, and where the estoppel springs entirely out of moral obligations and not out of legal formalities. For these reasons I think the claimant should recover.

22 *Motion for new trial.*

December term, 1873.

ELIJAH S. ALVORD
vs.
THE UNITED STATES. } 2171.

Now comes the plaintiff and moves the court to set aside the judgment rendered at the present term, and for a new trial and for cause thereof says:

The court erred upon the facts proved and found in rendering judgment in favor of the defendants, and in not rendering judgment in favor of the plaintiff.

THOMAS WILSON,
Att'y for Plaintiff.

Filed July 11, 1874.

23 *Motion for appeal.*

E. S. ALVORD
vs.
U. S. } 2170.

Now comes the plaintiff in the above-entitled cause and prays an appeal to the Supreme Court from the judgment rendered May 18, 1874.

THOMAS WILSON,
Attorney for Plaintiff.

(Endorsed:)
Filed July 23, 1874. A. H.
Allowed February 1, 1875. A. H.

24 *Continuance of motion for new trial.*

(Extract from minutes.)

WASHINGTON, *Monday, Nov.* 23, 1874.

The court met according to adjournment.

Present: Charles D. Drake, ch. justice; Edward G. Loring, Charles C. Nott, & William A. Richardson, judges.

* * * * * * *

ELIJAH S. ALVORD
vs.
THE UNITED STATES.

The motion for new trial in this case was continued.

WASHINGTON, *Monday, Feb'y* 1, 1875.

Court met according to adjournment.

Present: Charles D. Drake, ch. justice; Edward G. Loring, Charles C. Nott, & William A. Richardson, judges.

25 * * * * * * *

ELIJAH S. ALVORD
vs.
THE UNITED STATES.

The motion for new trial in this case was overruled.

* * * * * * *

M'r Wilson, for the claimant, presented an application for the allowance of an appeal filed July 23, 1874, and it was allowed as prayed for.

By the court.

26 In the Court of Claims.

ELIJAH S. ALVORD
vs.
THE UNITED STATES. } No. 2170.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the claimant for the allowance of an appeal, as filed in the clerk's office, July 23, 1874, and of the order of the court, February 1, 1875, allowing the same; of the *of the* finding of facts by the court; of the requests of the claimant and defendants for additional findings, and the orders of the court endorsed thereon; of the opinion of the court, and the dissenting opinion of Judge Nott; of the motion of the claimant for new trial, and the order of the court refusing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twelfth day of February, A. D. 1875.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 69. Elijah S. Alvord, appellant, vs. The United States. Court of Claims. Filed May 3d, 1875.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

ELIJAH S. ALVORD, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Appeal from the Court of Claims.

BRIEF AND ARGUMENT OF THOMAS WILSON FOR APPELLANT.

THOMAS WILSON, *Counsel for Appellant.*

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

ELIJAH S. ALVORD, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Appeal from the Court of Claims.

BRIEF AND ARGUMENT OF THOMAS WILSON FOR APPELLANT.

Assignment of Errors.

The Court of Claims erred:

1. *Upon the facts stated, in rendering judgment in favor of the defendant.*

2. *Upon the facts stated, in not rendering judgment in favor of the claimant.*

Statement of the Case.

I propose to follow the arrangement of the court below in its findings of fact. I adopt those findings. What I say will only be explanatory of them.

In accordance with the statute, the Postmaster General, every four years, advertises for proposals for carrying the United States mails. He receives the bids and makes the contracts. They are to be of four years' duration.

He did so in the spring of 1858. The contracts thus made were for services to begin July 1, 1858, and end June 30, 1862.

In 1858 he entered into five written contracts with the claimant for the transportation of the mail between Iowa City, in Iowa, and Fort Kearney, in Nebraska.

Between Iowa City (afterwards Marengo) and Des Moines the service was to be performed six times a week each way by four-horse coaches. Between Des Moines and Council Bluffs, three times a week each way by two-horse coaches. Between Council Bluffs and Omaha, Nebraska, six times a week in four-horse coaches. Between Omaha and Columbus three times a week by two-horse coaches. Between Columbus and Fort Kearney once a week by four-mule covered spring wagon.

By the extension of the Mississippi and Missouri Railroad from Iowa City westward, Marengo afterwards, became the eastern terminus of the claimant's stage route.

This made a continuous mail line from Marengo to Kearney, 433 miles in length.

The contracts provided for the above number of trips in each week, each way, and specified the foregoing as the means of conveyance. They were made in the ordinary and usual manner, and contained the ordinary and usual stipulations. The contractor was to carry the mail in a safe and secure manner in a boot under the driver's seat, and in prefence to passengers, and to their entire exclusion (from the coaches) if its weight or bulk required it. And he was to take the mail from every post office on the route, and deliver it to every other, and into the post office at each end of the route.

The compensation to the contractor was specified in each contract, but he was to collect from each postmaster along the routes the various sums due the United States quarterly ;

and after the deduction of his compensation he was to pay over the balance to the Post Office Department.

Matters progressed in this way quietly and without change, the claimant performing the service and receiving the compensation, up to the summer of 1861.

In the spring of that year, Congress established the route for the California overland mail from Achison, Kansas, to Placerville, California, (12 Stat., pp. 169, 205.) This was a daily service, and the price fixed was $1,000,000 per annum, or at the rate of $475 per mile per annum.

The route was established *via* Fort Kearney, where it intersected the western terminus of the claimant's routes.

Desiring more perfect mail facilities with California and the West, various prominent citizens of Iowa and Nebraska during the summer of 1861 petitioned the Postmaster General that the mail service on the claimant's routes, between Omaha and Fort Kearney, be increased from weekly and triweekly, as it then was, to daily. These petitions were presented to the Postmaster General by General Curtis, then member of Congress from Iowa. Negotiations were opened with the contractor, which, after some haggling and dickering as to price, resulted in the following agreement: On the 25th of July, 1861, the claimant offered in writing "to improve the service from Omaha to Kearney for $14,000 additional per annum." This offer the Postmaster General accepted on the 26th of July, and ordered, by an endorsement upon the original contract, "that the service between Omaha and Kearney be increased to a daily service, and that the claimant be allowed $14,000 additional per annum, to take effect from the date of its commencement."

This additional service commenced on the 5th of August, 1861.

I call the special attention of the court to this improvement

of service, for out of it has grown the only defence the United States has made to this claim.

The offer was for a specific service. It was specifically accepted. The offer and acceptance were both made in writing, and were respectively dated July 25th and 26th, 1861. The performance commenced August 5th.

The only effect of the arrangement was to increase the number of trips between Omaha and Kearney from weekly and tri-weekly to daily. It had no reference to the number of trips between Marengo and Omaha, nor did it work any change in the kind, weight, or amount of mails to be carried on any portion of the claimant's routes, either east or west of Omaha.

There was a provision in the contracts which was in accordance with the statute that if the Postmaster General should increase the service, it should be with a *pro rata* increase of compensation. This I suppose to have been a general provision inserted in all contracts. This provision was not lived up to by the Postmaster General, as I will show.

By the original contract the mails were to be carried between Omaha and Columbus, 78 miles, three times a week, by two-horse coaches at a compensation of $4,250 per annum; and between Columbus and Fort Kearney, 120 miles, once a week, by four-mule covered spring-wagons, at $9,989 per annum, making a total of $14,239 for the weekly and tri-weekly service between Omaha and Kearney.

This "arrangement" of July 25th and 26th wrought an increase in the number of trips from 2½ to 7 times greater than before, while the compensation was not quite doubled.

This increase of compensation was not *pro rata* with the increase of service, and the claimant might well have insisted upon a greater compensation; this occasioned the haggling before spoken of. But he performed the increased service and accepted the increased compensation; he cannot

now make any claim in that respect. It was fully settled in the order of July 26th, and fully paid for by the $14,000 additional per annum.

While he can make no claim or demand for *more money* for the service required under the order of July 26th, so the United States can make no claim or demand for *more service* than was required under that order. Nor can they be allowed to say that the $14,000 therein provided, should be held to be compensation for another and different service, ordered at subsequent time and performed upon other and different routes.

Up to September 16, 1861, the service under the contracts as enlarged by this $14,000 arrangement, was performed by the claimant and he received the compensation agreed upon, in the manner heretofore described, without complaint by either party.

At this point of time, September 16, the facts begin out of which spring this controversy. They are detailed in the second paragraph of the findings by the court, and paragraphs third and fourth of facts found as requested by the claimant.

On the 16th of September, 1861, in consequence of the route established by Congress for the through California mail having been broken up by the burning of bridges, the Postmaster General ordered, in writing, the California mail to be sent over the claimant's routes; and the claimant transported it under and in pursuance of such order from the 16th of September to the 25th of December, 1861.

This order of September 16 was a different order, entirely distinct from that of July 26, before described.

The route selected and established for the transportation of the California overland mail was by rail from Quincy, Illinois, to Saint Joseph, Missouri and Atchison, Kansas;

and from thence by coach *via* Fort Kearney to Placerville, California.

That portion of the route which was broken by the burning of bridges, was east of Fort Kearney and principally on the Hannibal and St. Joe Railroad through the State State of Missouri. The coach service was still continued westward from Fort Kearney. But it became necessary that the route *via* Atchison and the Hannibal and St. Joe Railroad, should be avoided and a connection made with Fort Kearney by some other route.

The Postmaster General accordingly chose a route further to the north, crossing the Mississippi river at Davenport, Iowa, instead of Quincy, Illinois, and ordered the California overland mail to be sent over the Mississippi and Missouri Railroad to Marengo, Iowa, and from thence over the claimant's routes through Des Moines, Council Bluffs and Omaha to Fort Kearney, when it was again taken on the regular overland mail route to Placerville.

But for this order the claimant would never have had to carry any of the great California overland mail. By this order he had to carry it all from September 16 to December 25, 1861.

The present claim is for compensation for carrying this California overland mail. It is confined exclusively to the extra service imposed by the order of September 16, 1861, and has no reference to the order of July 26th. It pertains entirely to the increased bulk of mail matter to be carried between Marengo and Kearney and is not affected by the daily mail established between Omaha and Kearney.

The court finds as a fact (par. 2,) that this California mail greatly exceeded in bulk the other mail matter which he was required to transport under his contracts and on some of his routes, required for its conveyance, at times, as many as five coaches per day, in addition to the one coach which he would otherwise have run, and it at all times, and on all his routes

required one or more additional coaches which were used *exclusively* for it; and the fair and reasonable value of the service for the period named was the sum of $35,100.

The court also finds, (par. 2, claimant's request for findings,) "that in the making of the original contracts, and also the 'arrangement' of July 25th and 26th, for the daily service between Omaha and Kearney at $14,000 additional, the circumstances, at the time, were such, that it was neither understood nor contemplated by any of the parties, that the overland California mail should be carried over or upon any of the plaintiff's mail routes."

With this meritorious cause of action the wonder is that in this appeal the claimant should be the appell*ant*. The reason is said to be found in the 3d paragraph of the findings of fact. But I think it affords no justification for a judgment in favor of the defendant.

This case has been twice tried in the court below. The report of the first trial is to be found 8 C. Cls., 364; of the second, 9 C. Cls. Upon the first trial it was found by the court that immediately after the claimant's services for carrying the California mail had terminated he presented his account therefor to the Postmaster General for payment; but that the Postmaster General refused to allow or pay the same, and directed the Second Assistant Postmaster General to reply in writing, which he did in the form of a letter dated February 12, 1862, signed by himself, saying "that when he made the arrangement with him (the claimant) to give him the $14,000 additional for improved service between Columbus and Fort Kearney, it was in view of his carrying the overland mails over that route and through Iowa free of additional expense should circumstances render it necessary temporarily so to send them. And that, *if the claim for additional compensation is to be pressed*, he would feel compelled at once to annul that arrangement."

The court found that the claimant "thereupon *refrained* from pressing his claim, and continued to run a daily mail from Omaha to Kearney, and to receive the consideration of $14,000 per annum."

The court held that "no one was permitted to keep silent when he should speak and thereby mislead another to his injury, (Per Davis J. Gregg *vs.* Von Phul, 1 Wall., p. 281,") and the claimant "refraining from pressing his claim" was a *silence* which enabled him to continue the receipt of the $14,000 per annum, and which was held to be equivalent to acquiescence, and so was an estoppel *in pais* which barred the claimant from a recovery.

A motion for new trial was made upon the ground that the estoppel could be removed by proof showing that he did *not* keep silent; that he had *not* "thereupon *refrained* from pressing his claim." This motion was allowed, and a new trial granted.

Upon the second trial (9 C. Cls.) the claimant effectually disproved the *silence* which before had defeated him.

And the court finds, upon the second trial, that "subsequent to the mailing of such letter, and *while the additional mail service*, at $14,000 per annum, *was still being rendered*, the claimant *presented documents* to prove the justice of his claim for conveying the California mail, and *otherwise pressed his demand by personal interviews with the Second Assistant Postmaster General*;" and that he was the officer with whom all of the business relating to this claim had previously been transacted, and he was by virtue of his office at the head and in charge of the Contract Bureau of the Post Office Department.

Argument.

The $14,000 arrangement, by reason of its offer, acceptance, and performance, entered into and became part of the original

contract. It could not be annulled without the consent of the contractor, or compensation to him in damages; so a protest by him against its annullment was unnecessary.

With the above findings of fact, I can only believe that the judgment in favor of the defendant must have been rendered under a misapprehension.

The ground on which it was placed was that the claimant, after the letter of February 12, 1862, continued to perform the extra service, and to receive the money for it; and that this was done without protest; and that the new trial was granted to enable him to show such protest.

A most careful reading of the opinion, (8 C. Cls., 234,) delivered upon the first trial, and also upon the allowance of the motion for new trial, fail to show anything said about a "protest" or its necessity. The decision was based entirely upon the estoppel *in pais;* and the new trial was granted solely upon the alleged ability of the claimant to remove by proof this bar.

The estoppel was said to have been wrought by the claimant's silence after the supposed receipt of the letter of February 12, 1862. In that letter the Postmaster General first states his idea and intention, at the time when he made the order for the increase of service between Omaha and Kearney, (which understanding and intention, by the way, has been negatived by the court,) and then proceeds to say, "that if the claim for additional compensation (for carrying California mail) *is to be pressed*, he would feel compelled to annul that arrangement." Now, the only answer he could make or give was to say whether he would press his claim for the additional compensation, or whether he would not.

He could not, it is true, show a formal written answer to the letter of February 12, for he states (and so declares under oath, in his affidavit in support of his motion for new trial,)

that he never received or knew of such or any similar letter being written to him.

Although no formal answer was given in writing by the claimant to this letter, for the reason heretofore stated, yet he gave a good and sufficient answer thereto when he "*presented documents to prove the justice of his claim, and otherwise pressed his claim by personal interviews with the Second Assistant Postmaster General.*" No man could misunderstand this. It was a direct answer to the letter of February 12th. By it the claimant said plainly and in unmistakeable language, "the claim for additional compensation *is to be pressed.*"

When this was shown to have been said, it answered the charge of "*silence,*" and removed the bar of estoppel *in pais.* That having been done, nothing remained but to render judgment for the claimant. I think in this the correct view is taken in the dissenting opinion.

The idea of "protest" is here brought in by the majority of the court for the first time. It is a new idea in this case, and is, I think, erroneous.

Upon the claimant's offer, made in writing, and its acceptance endorsed on the original contract by the Postmaster General, the additional service entered into and became part thereof, and the terms of the original contract became enlarged to include both the additional service and the additional compensation. And they became as much a part of the contract as though originally inserted.

The right to alter, change, or extend a written contract by a subsequent oral one has been recognized by the common law in all its ages and by all its sages.

Jeffrey *vs.* Walton, 1 Stark., 267.
1 Sanders on Pl. and Evd., p. 110.
Lawrence *vs.* Dale, 11 Verm., 549, 555.
Monroe *vs.* Perkins, 9 Pick., 298.
1 Greenleaf on Evd., 304.

Question has been made whether the subsequent oral would be valid to alter, change or extend the previous written contract, when the contract was required by the statute of frauds to be in writing.

Goss *vs.* Lord Nugent, 5 Barn. and Adolp, 58.
27 E. C., 233.
Adler *vs.* Freedman, 16 Cal., 140.

But this has no application to the case at bar for two reasons:

First, the law does not require the original contract to be in writing, and—

Second, the subsequent alteration or extension was in writing.

The contractor having acceded to the arrangement, performed the increased service, and drawn the increased pay from August 5, 1861, could not, in February, 1862, decline to further carry it out. He could not then refuse to perform the service, whatever he might have done at its commencement—a refusal *then* would have been a breach of his contract, which would have justified an entire abrogation of it by the Postmaster General, and the supply of the service at the expense of the delinquent contractor. A failure or refusal on this ground would have brought speedy punishment upon the contractor in the way of fine.

No, all he could do, or could be required to do, was to notify the Post Office Department of his intention to press his claim for additional compensation, for payment, and then if the Postmaster General saw fit to annul the $14,000 arrangement, the claimant might consider what course to pursue. If he coupled his annulment with an offer of proper compensation in the nature of damages, it might have been advantageous for the claimant to accept. If not, it might perhaps have given the claimant another right of action upon the contract.

Certain it is, that no "protest" would have availed him anything, and that had he ceased the daily service between

Omaha and Kearney, and returned to the original schedule without an order from the Post Office Department, he would have subjected himself to severe penalties.

Illustration: Suppose two men contract for the building of a house. The compensation is to be paid at the rate of $1,000 per month, and the house is to be completed by the 1st of October.

After a while the owner writes a letter to the builder, saying "I want you to finish the house by the 1st of July, and when I agreed to give you $1,000, it was with that view. If you do not agree to this, I shall feel compelled to refuse to pay you the $1,000 per month."

The contract having fixed July 1st as the time for completion, and $1,000 per month as the rate of payment, will any one claim that the builder is required to "protest" against this unauthorized and unilateral change of contract in order to save his rights. Can the owner change the contract in violation of its terms simply by saying "when I made it, it was in view of your doing something else not in the contract and not agreed upon between us; and if the other party keeps quiet—gives no consent, but fails to protest, does that, of its own force, work a change of the contract.

The letter of February 12, 1861, did not of itself pretend to annul the $14,000 arrangement. It only threatened that upon a certain contingency it might be done. But its annullment was not at all certain.

The same necessities which required an increase of service between Omaha and the West, and the same motives which prompted its original establishment, might require its continuance. The welfare of the people might require its continuance even though the punishment of the contractor required its abolishment.

But I deny the legal right of the Postmaster General to arbitrarily carry out the threat—to abrogate or annul this $14,000 arrangement.

I have already shown that by these acts, of offer on the one hand and acceptance on the other, and performance for a given period upon both hands, the terms of the original contracts became enlarged to embrace both the increased service and compensation—that they became as much part of the contracts as though originally inserted.

The obligatory character of a contract is such, that neither party to it can rightfully vacate its conditions without the consent of the other party.

The Postmaster General had no more right to annul this $14,000 arrangement against the will or without the consent of the contractor, than he had to annul any other portion, or even the whole, of the original. If he did so, it would have been an abrogation or breach of contract for which an action of damages would lie. This proposed "annullment" was not within the legal power or authority of the Postmaster General unless with the consent of claimant, or accompanied with proper compensation as damages.

I will not say that the Postmaster General having once made or extended or enlarged a contract for carrying the mails, which may be found afterwards to be unnecessary, cannot alter, change, or even abrogate it, but if he does, it must be either with the consent of the contractor, or upon tender of proper compensation, or such compensation as may be provided by law, in the nature of damages. He cannot make this alteration, change, or "annullment," arbitrarily and in disregard of the rights of the contractor.

If these be the corresponding and correlative rights of the respective parties—if the consent of the one is necessary before the contract can be annulled by the other, then it is clear that a protest from either would be unnecessary.

Where consent is required, protest is useless. The refusal of consent is quite as effectual to preserve the rights of either as the fullest protest would be.

Suppose the contractor purposes to annul the arrangement, withdraw the increased service and return to the original schedule, and he does so without first obtaining the consent of the Postmaster General—Would the Postmaster General be required to show a protest on his part? I trow not. It would be sufficient for him to show that he never gave his consent.

In the case at bar the claimant was never called on for his consent to the annulment of the $14,000 arrangement. It was never annulled. When it was proposed to be annulled it was only upon a contingency of his continuing to press his claim for carrying the California mail. I have already shown that this might never have been done, and that if done without consent or compensation, it would have been an arbitrary and illegal proceeding. But to this proposition the claimant either wittingly or unwittingly promptly replied by "*pressing his claim.*"

Here all necessity for further action on his part, pertaining to the annullment of the $14,000 arrangement, ended. His only concern was with the claim for additional compensation. This he continued to "*press for payment by personal interview,*" &c.

This removed the bar or defence of estoppel, and no protest being either needed or required from the claimant, judgment should pass in his favor upon the facts found, for the value of the services, $35,100.

II.

The claimant was not bound either by his contracts or by the $14,000 *arrangement to carry the California overland mail, unless he was paid additional compensation therefor.*

A clause in the original contract provided that the claimant should "take the mail and every part of it," &c. This has been claimed by the United States to require the claim-

ant to carry, without additional compensation, the five extra coach loads per day, exclusive of passengers, of California overland mail, which was turned on his routes by the order of September 16, 1861.

But this cannot be. In construing contracts the intention of the parties is to govern. This is the test, the criterion. In determining this intention the position of the parties and the circumstances of the case are to be considered.

The rule has been thus stated by Swayne, J., in Scott *vs.* The United States, 12 Wall., 443–44: "It is the duty of the court to assume the stand-point occupied by the parties when the contract was made—to let in the light of the surrounding circumstances, to see as the party saw, and to think as they must have thought, in assenting to the stipulations by which they are bound."

It is the rule recognized in the text books.

2 Parsons on Contr., 499, 549, 560, note g.
1 Greenleaf Evi., 277.
1 Hilliard on Contr., 281, 282.

Applying this rule to the case at bar, the Court of Claims has found as a fact (par. 2, claimant's request for findings,) "that in the making of the contract *and arrangement* mentioned in finding 1, the circumstances at the time were such that it was neither understood or contemplated by the parties that the overland California mail should be carried over or upon either of the plaintiff's mail routes."

And this finding is consistent with reason, for while the contracts were made in 1858, the California overland mail route was not established until the spring of 1861. The California mail had been carried by steam vessels *via* the Isthmus of Panama. This provision is the ordinary and usual, and is inserted in all contracts for carrying the mail.

When these contracts were made, the contractor and the Department must both have intended the usual and regular mail, acoording to the course pursued or expected to be pursued between those points, and neither of them could contemplate the doubling, trebling, or quintupling its weight by the diversion of an independent mail, which has been carried on another and different route established by Congress for that special purpose, and paid for at a much higher rate.

I think the true construction of such contracts was given by the Attorney General of the United States, B. F. Butler, in 1835, when he says :

"1. Where the contract is to carry the mail in a particular vehicle and by a particular number of horses ; and the mail, during the continuance of the contract, becomes so far increased in weight, either by the increased business done on the original route, or by attracting packages from other routes, that it cannot be carried in the vehicle and by the horses mentioned in the contract, but an additional vehicle or an additional horse or horses become necessary, and are therefor required by the department ;—this, I think, is an "additional service" for which a proportionate allowance may lawfully be made.

"2. Although no particular vehicle or number of horses be mentioned in the contract ; yet, if the mode of conveyance, and the strength to be employed, were mentioned in the proposals, or were otherwise clearly understood by the parties when they entered into the contract, I think the case may well be considered as standing on the same ground with the one just mentioned.

"3. You will observe that I speak without reference to passengers. So long as the mail can be carried in the vehicle and by the force specified in the contract, or otherwise contemplated by the parties, I think the contractor is bound to carry it, even though it may compel him to diminish the number of his passengers, or even to exclude them altogether,

unless the right to carry at all times a certain number of passengers is specially reserved to him in the contract."

See also Rhodes *vs.* United States, C. of C., 1855.
Huston " "
McAtee & Eastman " "

Illustration: The Baltimore and Ohio railroad has for many years supplied the Western States with the mails from Washington and Baltimore. It was carried twice a day each way, and amounted in bulk each trip, I am informed, to several tons.

At the same time, and at present, unless changed by the late construction of the Metropolitan Branch railroad from Washington to Point of Rocks, the mails were carried from Washington to Rockville, Maryland, in a little two-horse "jerkey wagon," and from thence on northwest to Frederick and Harper's Ferry. In the contract made on this two-horse route will be found the same clause as in the claimant's contracts—that is, he is "to take the mail and every part of it," &c., &c. It is a proper and necessary clause, and should be put in every contract. But who will say that under this clause the Postmaster General would have the right, in case of suspension of travel on the Baltimore and Ohio railroad, to turn the entire Western mail over the Rockville route, and by his order issued to that effect compel that contractor to hire teams, stock the route, and run five teams each day where before he only was bound to run one, and do this without any right to additional compensation. The statement of the proposition is its own refutation.

Neither did the $14,000 arrangement contemplate such carrying.

This is expressly found by the court, as above quoted.

The $14,000 arrangement consisted of a offer made by the claimant in writing, and accepted by the Post Office Department also in writing. No word is to be found in either

writing which can be tortured into an agreement to carry the California mail, or any understanding to that effect. It provides for an increase in the frequency of trips; it establishes a daily instead of a weekly and tri-weekly mail; it pertains to service between Omaha and Kearney, and has no reference—no allusion to any increase of service between Omaha and Marengo, nor to an increase in the bulk of mails to be carried over the entire routes. The contract for service between Omaha and Kearney were entirely different and separate from those between Marengo and Omaha. No endorsement was made upon them, and no change made in that service under or by the order of July 26.

To seek now to prove by oral testimony what the intention of the party was at the time that order was made is in direct conflict with the rule of law that parol contemporaneous evidence cannot control, alter, or vary a written instrument.

III.

"He pressed his demand by personsal interviews with the Second Assistant Postmaster General," &c.

Some point was sought to be made in the court below because the claimant did not press his claim before the Postmaster General *in person* or notify him *personally* that his claim was being pressed for payment.

I think he was not obliged to do this. The findings of fact show that immediately after his services for carrying the California mail had terminated, he presented his account therefor *to the Postmaster General*, and requested that it be liquidated and paid. The Postmaster General did not see fit to correspond or deal with the claimant. He turned over the claim to the proper officer in charge of the Contract Bureau. This was the *Second Assistant*. He gave him his

instructions and directed him what reply to make to the claimant.

Thus, the whole matter, so far as the claimant was concerned was in the hands of the Second Assistant. There had been a regular reference of the claimant and his claim to this officer. He it was with whom the claimant had to deal, and with him alone. The claimant dealt with him, and it was with him that he had the personal interviews.

This is a very technical objection, and I hope will not be urged in this court. It refers to the etiquette of the Post Office Department, and the relations between the Postmaster General, and his subordinates, rather than to any legal right belonging to, or duly imposed upon the claimant.

THOMAS WILSON,
Attorney for Appellant.

In the Supreme Court of the United States.

ELIJAH S. ALVORD
vs.
THE UNITED STATES. } No. 69.

Brief for the United States.

In the Supreme Court of the United States.

ELIJAH S. ALVORD
vs.
THE UNITED STATES. } No. 69.

BRIEF FOR THE UNITED STATES.

The record shows that in September, 1861, the claimant, being then (and since 1858) contractor to carry the mail from Iowa City to Kearney City, in Nebraska, was called upon, because of an exigency arising out of the late rebellion, to transport over such route, for one hundred days, the overland California mail, which up to that time had been carried upon another route.

At that time the compensation payable to the claimant on account of his regular service (above) was $45,159 per annum, (folio 16.) Of this amount $14,000 had been awarded to him by the Postmaster-General in July, 1861, for a certain *improvement* in the previous regular service under the contract of 1858; such *improvement* being a change from tri-weekly, &c., service to daily service over a large part of said route.

After performing such service, the claimant presented his account therefor to the Postmaster-General, and requested that it be liquidated and paid; but the Postmaster-General refused to allow or pay the same, and directed the Second Assistant Postmaster-General to reply that, when arranging the improved service in July

preceding, he (the Postmaster-General) had done so in view of the claimant's carrying the overland mails over that route and through Iowa free of additional expense, should circumstances make it necessary temporarily so to send them; and that if the claim for additional compensation for such service were pressed, he would feel compelled to annul that arrangement. Accordingly a letter to that effect was duly mailed to the claimant.

Thereupon no more was said by the claimant upon that subject to the Postmaster-General, but "documents to prove the justice of his claim" were presented by him to the Second Assistant Postmaster-General, and he "otherwise pressed his demand by personal interviews with the Second Assistant [who was the head of the contract bureau,] with whom all the business relating to this claim had previously been transacted. He did not otherwise notify the Postmaster-General that his claim for the California mail service would be pressed."

The Second Assistant did not notify the Postmaster-General that the claimant had so "pressed" his claim; and the latter continued his service according to the improved terms until the close of his contract.

At the time when the *improved* service was ordered "it was neither understood nor contemplated by the parties that the overland California mail should be carried over or upon either of the plaintiff's mail-routes," (folio 17.)

Upon this state of facts the Court of Claims held the claimant *estopped* to pursue his demand; because after presenting his account therefor to the Postmaster General, and being informed by him that if it was pressed it would be at his expense, having the benefit of a certain other arrangement with the Government cur-

tailed, he apparently abandoned his account so presented, and went on to reap those other benefits in full; the effect of this conduct not being removed by the fact that, by personal interviews and by exhibiting documents to prove its justice, he "pressed" such claim before the Second Assistant.

Before proceeding further, I desire to notice what seems to be an inadvertency in the findings of the Court of Claims in respect to the compensation to which, if to anything, the claimant is entitled.

The claimant filed, along with his petition, an account, claiming at the rate of $300 per day for 117 days, or in all $35,100, (page 8, top.) The court find that he was engaged for only 100 days, (page 8, middle,) yet assess for him the same aggregate amount of compensation, *i. e.*, $51 more per day than he had asked.

But this is not all that may be said upon this finding: for the act of 1825, ch. 64, sec. 43, (4 Stat., 114,) provides that "no additional compensation shall be allowed to exceed the exact proportion of the original amount to the additional duties required." This rule enters into the original contracts made by persons carrying the mail, and they are therefore to be taken to have agreed to do such additional service at that rate, and, therefore, it binds them not only before the Department, but in the courts. Now, the findings do not state the exact amount of the additional service in this case, but the petition states and makes claim for an amount of service which must be assumed here to be the extreme limit of what actually was done.

On folio 8 (bottom) the petition sets forth that the claimant *ran during the entire time not less than ten extra*

coaches per week. He does not say that *ten* were all; but that the extra number was at least ten. In his favor I will assume it to have been ten. The court finds (folio 14, near end) that under his regular contract he ran *one* coach daily. For such daily service, *i. e.*, *seven* coaches per week, he received (folio 16) $45,159 per annum. The simple question, therefore, is as follows, (supposing the claimant entitled to recover at all:) If seven coaches per week are worth $45,159 per annum, what are ten coaches per week worth for 100 days? The answer is $17,674.75, which, therefore, is the largest amount to which, by his own statement, the claimant can be entitled.

The case states that the claimant presented his *account to the Postmaster-General.* This *account* seems to have remained there. There is no statement that it was withdrawn, and certainly the disposition of the Postmaster-General toward it shows plainly that it was not *referred* to any other officer.

In this state of things *personal interviews* with the Second Assistant, even together with an exhibition of *documents* in proof of his claim, did not amount to a technical *pressing* thereof: even admitting that after being notified of the views of the chief officer of the Department in that connection he could evade their operation by thus, "without observation," going before a subordinate.

It does not appear that the claimant presented any account to the Second Assistant as a basis for his interview, or for rendering his documentary evidence pertinent *in point of business.* It seems that no amount of personal interviews, or of mere evidence, in the absence

of an account in writing, would have justified the Postmaster-General (had he known of it) in treating the claimant as having, contrary to his own intimation, *pressed* his claim before the Second Assistant, and so *forfeited* his *improved* compensation.

If the Second Assistant were the proper officer to pass upon the compensation for "additional service," which does not appear, he could not have acted without a case being regularly presented by an account in writing. A party does not press a claim in court by going into the court-room and holding personal interviews with the judge about it, and showing him his titles, unless a suit has been entered; and something analogous is required in the Departments, and is not shown to have existed here.

Inconsequential talk about claims upon the Government, accompanied, no doubt, frequently by "documents" in proof thereof, is quite common in the Departments. The only *suit* brought was that before the Postmaster-General, where the account was presented, and upon an unfavorable intimation (above) ceased to be pressed, and was abandoned.

It appears, then, that with views best known to himself, and which cannot be properly weighed at this distance of time, the claimant, after fair notice, made election between the two alternatives (one being *a "bird in the hand"*) presented to him by the Postmaster-General, and that he has had the benefit thereof; it seems, then, that he cannot now elect anew, as it is impossible to restore the United States to the *statu quo*.

S. F. PHILLIPS,
Solicitor-General.

ground that it was costing him a great deal of money. I then came to the conclusion to pay more attention to my weekly stipend for services in the case than to look for any income from the patents.

Q. 63. How long after he spoke did you continue to receive your weekly stipend?

A. From one to two months, I think; possibly more.

Q. 64. Why did the fact that he spoke of discontinuing the suits under the patents induce you to determine to depend on your weekly stipend thereafter?

A. Because, as I answered before, I attached more value to my weekly stipend than I did to my interest in the patents.

Q. 65. How did Mr. Herr's speaking of discontinuing those suits cause this effect upon your mind as to the value of those patents as a dependence?

A. Because he had the means under his management to carry those suits to an end, and the other co-owners were unable or unwilling.

Q. 66. Why do you think they were unable or unwilling?

A. Because they stated so.

Q. 75. If, then, you and he, (A. H. Herr,) continued on speaking terms down to the day of hearing, will you explain to me why you did not ask him or learn from him why the suits on the patents in which you were an equitable co-owner were discontinued?

A. I suppose because I did not attach sufficient importance to them, for one reason; another reason was that I did not care to converse with him, knowing that he never liked me.

Q. 76. Why did you not attach sufficient importance to them?

A. Because I thought that he had lost interest in it, and I did not think we would find anybody else to advance the money to carry them on.

Q. 77. What was the amount of your interest in

these patents, and what was the consideration for the deed of trust made to Mr. Herr?

A. I think my interest was one-eighth in each. The consideration for the trust, if I remember right, was $250.

Testimony of A. H. Herr, record, p. 28.

Q. 99. Why did you terminate or desire to terminate his, A. L. Merriman's relations, in view of your other patents, of which you and your associates were the owners?

A. *I had lost faith, and did not intend, so far as I* was concerned, to prosecute the matter any further.

Q. 100. What made you lose faith at that time or before?

A. I was advised by these legal gentlemen to abandon the suits, and I was advised by H. B. Renwick, of New York.

Q. 49 What became of that association—(the association under the Welch, Reynolds & Wheeler patents;) give the history of its rise and progress?

A. It fell through; there was never any money made under that patent, except $1,000 from Jones & Company of New York; this was under the Welch, and all the patents that our association owned; that was all the money ever received by that association: I was the treasurer: had a number of meetings.

Q. 47. Why did the association fall through?

A. Because we made no progress. We brought those suits referred to, but they were never tried, and there seemed to be no particular necessity of calling together.

Q. 49. Calling whom together?

A. These parties.

Q. 49. What particular member or officer of the association had charge and conduct of those suits?

A. We were all consulted whenever there was a move made. Mr. James S. Welch, Mr. J. A. Maloney

and Judge A. L. Merriman visited St. Louis at the holding of a meeting there by the millers' association. Before they left, I told them not to bring a suit. They went out for the purpose of meeting the millers and talking the matter over with them; and about the last word I said to them was, for God's sake not to bring any suits.

Q. 50. Who had charge of the bringing of those suits and the management, and who furnished the funds with which to commence and prosecute them?

A. They went out, as I stated, and they brought suits contrary to my personal wish. I had but a single vote in the company. They brought suits against Stannard & Co., and then they returned *via* Rochester, and brought two suits there against my express protest.

(Mr. Mason objects to this course of examination as being entirely irrelevant to this inquiry, and as calling upon the witness to testify concerning that which counsel have no right to inquire.)

Q. 57. What became of these suits that were instituted?

A. They were dismissed by authority of all the parties concerned. I think I have a writing to that effect.

Q. 58. Will you please produce the writing referred to in your last answer?

A. I will.

Q. 59. Why was that writing entered into, and why were the suits discontinued?

A. Because we looked upon them as hopeless.

Q. 60. What made you come to the conclusion that they were hopeless?

A. We were advised so by our counsel. I think I have a writing to that effect at home; I am not sure.

Q. 61 Who was your counsel?

A. One was Judge Merriman.

Q. 62. Please state the names of the other counsel?

A. Mr. Walter D. Davidge; and H. B. Renwick, a very prominent expert in patents, of New York, also advised me.

Q. 64. Will you please produce those letters containing the opinions to which you have referred?

A. I do not think I have the letters, so far as Mr. Davidge and Mr. Renwick are concerned. I think I have Judge Merriman's opinion in writing.

Mr. HARDING. Please produce Judge Merriman's opinion.

WITNESS. I am not positive as to that; so many papers have passed through my hands that I cannot recollect.

Q. 65. Did you abandon your purpose of making a permanent organization, in consequence of these opinions?

A. That organization was permitted to die out; I cannot assign any particular reason but because we were not successful.

Record, page 24, Merriman's Letter to Herr.

WASHINGTON, *Aug.* 24, 1876.

A. H. HERR:

DEAR SIR: In the matter of the suits brought by Herr, Welch and others against sundry parties on the Wheeler and Reynolds and E. P. Welch patents, some of which have been withdrawn and others are now pending, I have advised such withdrawal, and advise the withdrawal of the suits still pending.

Respectfully, &c.,

A. L. MERRIMAN.

We fully concur in the above, and authorize you to withdraw all the suits now pending.

JAMES H. WELCH.
ROSIA W. WELCH.
E. P. WELCH.

Record, page 62.

JAS. S. WELCH.

A. L. Merriman, attorney for Herr and Welch, record, page 146.

Q. 24. You had had charge of the Welch patents as counsel, under a salary, for some time previous, had you not?

A. Yes; up to some time in the summer of 1876. I do not recollect the exact time when I quit.

Q. 25. Was your salary discontinued then?

A. Yes.

Q. 26. Do you know why it was discontinued?

A. Yes; I suppose I know the reason. They concluded to *drop all proceedings under those patents*, and consequently did not want any counsel.

A. H. Herr owned a mill at Georgetown, with 9 run of stone, and by an indenture of lease dated July 12, 1875, he leased to Josiah W. Deener, Geo. W. Cissell, James H. Welch, R. W. Welch, E. P. Welch and Austin Herr, the appellants, his mill.

J. S. Welch also owned a neighboring mill, at Georgetown, with 14 run of stones, and he leased his mill to the appellants, also, about the same time.

It was fully understood between the respective lessors and lessees that the lessors would indemnify the lessees against loss or damage by reason of the interference by injunction or by a recovery of Cochran and his associates under the Cochrane re-issue patent.

A. H. Herr, record p. 18.

Q. 2. Were you the owner of certain mills, or part owner of certain mills, leased to Deener, Cissel & Welch, the defendants in the suit of Cochrane *et al. vs.* Cissel *et al.*?

A. I was the sole owner of the Pioneer Mills, leased to Deener, Cissell & Welch.

Q. 3. The last named parties were the defendants in the suit of Cochrane *et al. vs.* Deener *et al.*, were they not?

A. Yes, sir.

Q. 4. What was the extent of those mills, and how many were there?

A. I had nine run of burrs—six on wheat, and the rest were generally used on middlings.

Q. 5. How many run of stone in all did the defendants in the suit of Cochrane *et al. vs.* Denver *et al.* run?

A. The other mill, I believe has fourteen run—that is, the mill belonging to Mr. James S. Welch, called the Columbia Mill; that is, fourteen run, all told.

Q. 8. What is the entire number of run of stones which the defendants in the suit of Cochrane *et al. vs.* Deener *et al.* were running?

A. That would be 23—14 and 9—to the best of my knowledge. I am not perfectly sure as to the Columbia Mills. I speak with positiveness as to my own. There are nine in my own, and I think fourteen in the other.

Q. 9. Who owns the mill which had the 14 run of stone in it?

A. James S. Welch.

Q. 10. Did he lease that mill to the defendants?

A. So I understand. I have no personal knowledge; that is, I never saw the lease.

Q. 12. Did you at any time have an understanding, or did Mr. Welch have an understanding, to your knowl dge, to guarantee them against loss by reason of infringement of the Cochrane patent?

A. When this suit was brought of course the question came up as to who was liable, and I felt myself bound to defend them, having leased the property in good faith, including all the machinery which is claimed to be infringed.

Q. 13. Did Mr. J. S. Welch have an agreement of the same kind, to your knowledge?

A. Mr. J. S. Welch agreed with me after talking the matter over.

Q. 14. State to what effect?

A. *We were to defend that suit.*

The appellees regarded the danger of an injunction, and the risk of claim for damages in the suit of Cochrane *vs.* Deener, to be most serious, and they looked to Herr for indemnity.

Cissell, rec. p. 84.

Q. 13. Who had the raising of the money to pay the counsel?

A. I do not know; I suppose Mr. Herr did; he seemed to be the moneyed man

Q. 14. Did you know that if the suit was decided against you an injunction might possibly be awarded?

A. Yes, sir.

Q. 15 Did this annoy you?

A. He spoke to me about what we would do, and I told him that I did not think Deener, Cissell & Welsh had anything to do with it; that I thought Herr and Welch had to protect our interest. I told him if he did not only protect it, that Deener, Cissell & Welch would not sue him for whatever judgment would be against us, but also for damages.

Q. 16. Would it have been a serious damage if your mills had been stopped under the injunction?

A. Yes, sir.

Q. 17. Can you give me any idea of the amount of the damage?

A. Our expenses for running those two mills were pretty heavy; we were paying $18,000 a year rent, and about $4000 water rent besides—making about $22,000 that we paid for the use of the mills, without anything else.

Q. 18. This flour made under this patent process stands high in the market, does it not?

A. Yes, sir.

Q. 19. Has your flour a great reputation here?

A. Yes, sir; I believe it has.

Q. 20. Would it not have been a serious embarassment or loss to you if you could not have made that grade of flour?

A. Yes, sir; I should think it would.

Q. 21. When you called Mr. Herr's attention to the subject of the injunction, what did he say?

A. He said of course he would protect our interest; that he did not intend it should cost us anything; that he would do all that could be done, and not only that, but if there was any judgment against us he would settle it He said he felt it to be his duty to do it, and he would do it.

James H. Welch, one of the appellants, record p.

Q. 14. Had you any fear of the result of that suit (Cochrane *vs.* Deemer,) I mean of the consequences to you and damage to the firm?

A. Yes; we *were very apprehensive about it* at one time.

Q. 15. To whom did you look in case it had gone against you?

A. We expected my father to be responsible to the firm of Deener, Cissell & Welch for any damages that might accrue from loss in the suit.

Q. 16 Was your father in partnership with Mr. Herr?

A. No, sir; not at that time.

Q. 17. There were two mills you were running at that time, one owned by Mr. Herr and one by your father, Mr. James S. Welch?

A. Yes, sir.

Q. 18. And then you looked to Mr. Herr and your father to indemnify you in the respective mills in case

you had been enjoined, and had suffered loss by damage, did you?

A. Yes, sir.

Q. 19. Would the injunction have been a serious inconvenience to you if the mill had been stopped from the use of this process?

A. Yes, sir.

E. P. Welch, p.

Q. 9. Who had charge of the defence of the suit, Cochrane *vs.* Deener?

A. Mr. A. H. Herr.

Q. 10. Did you regard Mr. Herr as indemnifying you against loss or damage by reason of losing the suit of Cochrane *vs.* Deener, so far as the Herr mill was concerned?

A. Yes, sir.

Q. 11. Did any of the defendants furnish any money to defend the suit?

A. No; Mr. Herr furnished it all.

R. W. Welch, record p.

Q. 27. Would it have been a serious inconvenience to you if your mills had been stopped?

A. I should think so.

Q. 28. Give me some idea of how much inconvenience it would have been?

A. Do you mean to stop them permanently?

Q. 29. Yes; to stop the use of that process apparatus at your mills?

A. It would have been a loss according to the capacity.

Q. 30. Can you give me some idea, if an injunction had been granted against the purifying process, how far it would have affected you?

A. I cannot exactly understand the question.

Q. 31. If an injunction had been granted against you in the winter of 1877—January, 1877, we will say—

The WITNESS, (interrupting.) What loss would we have sustained?

Q. 32. Yes; suppose your mill had been stopped from the use of this process?

A. Having a demand for all the flour we can turn out, if it had been stopped a month we would have lost 5000 barrels of flour.

Herr's anxiety for the settlement and his relief after it was made.

A. H. Herr, record, page 54.

Q. 360. Will you say that you felt no anxiety before you made that settlement about the possibility of the mill being stopped by injunction, and you having heavy damages to pay?

A. Of course I felt anxious about it.

Q. 365. What trouble did you expect to have from an unfavorable decision prior to making this settlement?

A. I expected my mill might be stopped. I had no experience in matters of that sort.

Q. 366. Was *that the principal weight upon your mind—your mill being stopped if the suit went against you*—prior to making this settlement.

A. And the loss that I might sustain by stoppage of our manufacture of flour.

Q. 367. Do you not think that the reason of the mill being stopped and the loss incident to the stoppage would be calculated to make a man feel very anxious about the result of his suit?

A. Yes; it would make a man feel anxious.

Q. 368. Do you not think the question of the stoppage of a man's mill would make him feel very anxious?

A. I admit that.

Q. 371. When you went to see Mr. Cox and talked to him, was it in the hope that you would get rid of that danger?

A. That was my object.

Q. 373. But that was your main motive in adjusting this case?

A. *In calling upon him?*

Q. 374. After you left him, the only risk you had was $500 in the matter, was it not, as you understood it?

A. Yes, sir; that is about all.

Q. 353. You were quite desirous of getting this thing off your mind. were you not?

(Objected to by Mr. Mason, as leading.)

A. Yes; I admit that that is very natural.

Q. 354. And you felt freer and easier in mind, did you not. after you had made this arrangement with Mr. Cox?

(Objected to by Mr. Mason, as tending to confuse the record as to which party is testifying, Mr. Harding or Mr. Herr.)

A. I did.

Q. 357. Did you or not feel less interested in the case, and in the preparation of it and its result, after this settlement, than you did before?

A. What settlement do you refer to?

Q. 358. I mean the settlement with Mr. Cox, by which you were to pay $250 cash yourself, and $250 in a note, if you were beaten?

A. If I remember right, all the counsel had been engaged, and there was no further necessity for the expenditure of money.

Q. 359. I do not ask you about the expenditure of money; I ask you about your interest, whether you felt more or less anxiety and interest after that settlement than you did before?

A. *I suppose I felt less anxiety, but it was a matter of business and disposed of, and I cannot say that I have any particular recollection.*

Q. 314. You have attained a high reputation for flour here, have you not?

A. Yes.

Q. 315. Are you not very desirous of maintaining it?

A. Yes, that is true.

Q. 316. It has been the result of years of devotion to all the improvements, has it not?

A. Yes, sir.

Q. 317. Were you not afraid if this case (Cochrane *vs.* Deener) had gone in favor of the plaintiffs in the Supreme Court on appeal that you might be stopped by an injunction?

A. After the agreement had been made?

Q. 318. No; before the agreement was made?

A. That would have been a natural consequence, I reckon.

Q. 319. Do you not know that you feared it?

A. Yes, sir, I feared it.

Q. 324. But after you had made the agreement as to compensation, were you not then assured that no injunction could issue?

A. Of course I was.

Q. 325. Was not that a great relief to your mind?

A. Yes, certainly it was. Record p. 49.

Circumstances under which settlement was made.

Mr. Mason at the outset notified defendants if they would hurry up the case they should be liberally treated. Mason, record, p. 133: "I did say this, I think, some time after the suit was commenced, that if the case was expedited without being unnecessarily delayed, I would deal fairly or liberally."

Accordingly the case was prepared with unwonted speed. The answer was filed sixty days before it was due under the rules, the replication being filed at once, the taking of testimony was entered upon and

closed so that the case was heard and decided in scarcely six months from the filing of the bill.

The principal testimony was taken by Mr. Maloney, who was only at the time a student, and was compensated at the rate of $20 a week. He cross-examined the expert, Edward S. Renwick; also examined the defendant's expert. Crawford, and one of the co-plaintiffs, Warder.

Preparation of case of Cochrane *vs.* Deener, Maloney, rec. p.

Q. 30. What witnesses did you examine in that case of Cochrane *et al. vs.* Deener *et al.*?

A. I cross-examined Edward S. Renwick.

Q. 31. Is that all the witness you examined?

A. I examined Newton S. Crawford, the greater portion of his testimony, and William Warder; and I also attended the examination of Warder and Ross Mitchell, and I will add Rosia W. Welch.

Q. 32. Did you receive any compensation for those services?

A. My compensation was general; for general services.

Q. 33. What was the compensation?

A. In the neighborhood of $900 a year.

Q. 34. Who paid you that compensation?

A. A. H. Herr.

Q. 35. How long did he continue to pay you that compensation; between what times?

A. I think from the re-issue of the Wheeler and Reynolds' patent up to the date of hearing in the Supreme Court of the District of Columbia.

Q. 15. You were asked what relation you had to the suit of Cochrane *et al. vs.* Deener *et al.*; did you not act as attorney, solicitor, or counsel in connection with that suit?

A. I did not act as attorney, *for the reason that I had* not then been admitted to the bar.

Q. 17. In what capacity did you examine the witnesses?

A. As a co-owner.

Q. 18. Co-owner of what?

A. Of the patents before mentioned.

Q. 19. When did you become an attorney?

A. I think on the 16th day of May, 1876, or thereabouts.

It is not remarkable that the appellants should be anxious to have for their test case, a case thus prepared.

After the case was closed, and before final hearing in the Court below, as follows: (see slip attached,)

Mr. Mason prepared this paper, and induced defendants' counsel to sign it, and also caused it to be signed by Mr. Cox. Although belonging to the Court below, and drawn up before there was any appeal in existence, it was retained by complainants' counsel until the appeal was made, and then filed in the Supreme Court.

Mr. Davidge insisted on the necessity of an oral argument in the Supreme Court.

Mr. Herr called on Mr. Cox and told him that the defendants were not willing, under Davidge's advice, that the case on appeal should be argued in writing, and then made a proposition to Mr. Cox for proving the patent.

Q. 128. Did you state to Mr. Cochrane or any of the plaintiffs in that suit, or their counsel, *that you were disposed, under the advice of Mr. Davidge*, to have an oral argument of the case?

A Yes, sir; I did. I had that conversation with one of the parties.

Q. 129. To which one of the parties did you state that the defendants were disposed to have an oral argument in the Supreme Court, under the advice of Mr. Davidge?

A. To Mr. Walter S. Cox, I think.

Q. 130. What did Mr. Cox say to you?

A. He expressed to me his determination to enforce the stipulation.

Q. 131. Did you ever apply to Mr. Cox to pool your patents and his?

A. I did mention the matter to him.

Q. 136. In case the patents were pooled, did you give him to understand that you would go ahead and try to break the Cochrane patent?

A. My idea was that he would withdraw the suit—

A. I did not act as attorney, *for the reason that I had* not then been admitted to the bar.

Q. 17. In what capacity did you examine the witnesses?

A. As a co-owner.

Q. 18. Co-owner of what?

A. Of the patents before mentioned.

Q. 19. When did you become an attorney?

A. I think on the 16th day of May, 1876, or thereabouts.

It is not remarkable that the appellants should be anxious to have for their test case, a case thus prepared.

After the case was closed, and before final hearing in the Court below, as follows: (see slip attached)

WM. F. COCHRANE *et al.*,
vs.
J. W. DEENER *et al.*

In Equity, No. 4701.

Whereas, as it now appears to both the respective parties to be to their interest, that the final decision of this case should be expedited as much as possible; now, therefore, they do mutually agree each for themselves, to do whatever can be done to expedite the conclusions of the case. That from the final decree of the Supreme Court of the District of Columbia, the defeated party will appeal to the first ensuing term of the Supreme Court of the United States, or be considered as finally waiving the right to appeal, and that the case shall be submitted in the latter court on printed arguments under the rule.

Executed April 8, 1876.

(Signed) WALTER S. COX,
Solicitor for Complainants.

(Signed) A. L. MERRIMAN,
Solicitor for Defendants.

A Yes, sir; I did. I had that conversation with one of the parties.

Q. 129. To which one of the parties did you state that the defendants were disposed to have an oral argument in the Supreme Court, under the advice of Mr. Davidge?

A. To Mr. Walter S. Cox, I think.

Q. 130. What did Mr. Cox say to you?

A. He expressed to me his determination to enforce the stipulation.

Q. 131. Did you ever apply to Mr. Cox to pool your patents and his?

A. I did mention the matter to him.

Q. 136. In case the patents were pooled, did you give him to understand that you would go ahead and try to break the Cochrane patent?

A. My idea was that he would withdraw the suit—would not allow it to come to a decision, and, in that case, I was in hopes we would derive some benefit; but he refused peremptorily to make any conditions.

Q. 137. Did he state any reason for refusing?

A. Yes, sir; I think I gave that in a paper that can be produced.

Q. 138. Please state the reasons that he gave you?

A. If there was any taint discovered by the Supreme Court of the United States—this may not be in his language—if there was any taint discovered, or any collusion, the case would be dismissed; consequently he would not hear to any proposition, except to have the case tried in a fair and square manner; and I will say that on several occasions he told me to employ the best counsel I could.

By Mr. HARDING:

Q. 142. What did you say to Mr. Cox when he made the remark about the Supreme Court and the tainting?

A. I asked him what he was going to charge me.

A. I asked Mr. Cox what he was going to charge if

the case should go against us—Deener, Cissell & Welch.

Q. 143. What did Mr. Cox say?

A. He stated that his object was not to be excessive in his charge; he thought $2500; I talked the matter over with him some time, and he finally agreed to take $1000 for the two mills—the Pioneer Mill, belonging to myself, and the Columbia Mill, belonging to Mr. Welch; that is to say, $500 for each mill, $250 cash and $250 in twelve months. *and we so settled* after the termination of the decision.

Q. 154. Did Mr. Walter S. Cox sign any paper setting forth this agreement?

A. He peremptorily refused to do so.

Q. 155. Did you ask him to do it?

A. I did.

Q. 156. Why did you want it?

A. For the simple reason that I wanted to be fortified in the event of his death, or something of that sort.

Q. 157. Why did he peremptorily refuse to sign that paper setting forth the agreement.

A. I do not remember that he assigned any particular reason, but he refused.

Q. 158. Try to remember.

A. I do not think he gave any particular reason.

Q. 159. If he gave any reason in general?

A. I inferred—if you wish me to state that—

(Mr. Mason objects to witness stating inferences.)

Mr. HARDING. Go on and state what you understood to be his reason.

A. I inferred that his reasons were that he wanted to do nothing that would in any way taint the case.

* * * * * * * * * * * * * * * * *

Q. 203. Then after you reported the agreement that you had made to the parties, did you, at the same time, or about that period, give your opinion also as to their moral obligation to submit it on a printed brief?

A. I contended that we had gone into that matter. And let me here state that I did not approve of that stipulation in the first instance, and that I was the last to give adhesion to it. Then, after it was done, I told him I thought we were morally bound to carry it out, and I would not be accountable for the consequence, at least, if we attempted to have it argued orally and failed.

Q. 204. After you had reported this conversation about the settlement and the arrangements you had made, did the parties agree that the case should be argued on printed argument, and sign a paper to that effect?

A. I think so.

He then proceeds to engage Mr. Merriman, and instructs him to make an oral argument.

Q. 209. Did you tell your counsel, *after* you had had this agreement or written paper about the oral arguments, the conclusion the defendants had come to?

A. Oh, yes.

Q. 210. Whom did you tell?

A. I told Judge Merriman, and re-engaged him.

Q. 211. You re-engaged him then?

A. Yes, sir.

Q. 212. Then it was that you agreed to pay him the $100, was it?

Mr. Welch still insisted that Mr. Davidge should make an argument, but Mr. Herr was unwilling.

Q. 48. Were you present at any consultation where it was determined not to make an oral argument in the case of Cochrane *et al. vs.* Deener *et al.*, in the Supreme Court of the United States?

A. Yes, sir, I was, upon one occasion when Judge Merriman and Mr. Herr met at my father's house, and he said that the counsel had agreed among themselves to put the case before the Court on printed briefs.

Q. 49 Do you know anything about your father or you desiring Mr. Davidge to take part in the argument in this case?

A. Yes, sir.

Q. 50. What do you know on that subject?

A. Well, my father requested me to see Mr. Herr and say to him that if he would retain Mr. Davidge, and let him argue the case orally before the Supreme Court of the United States, he would pay one-half of his fee.

Q. 51. Did you understand how much Mr. Davidge's fee was?

A. $1000, I think.

The decision of the Supreme Court was rendered March 19, 1877, and on the 4th of April the money and note was given, and two receipts and licenses were delivered; of one of which the following is a copy:

Q. 160. When did you pay the $250 cash, and give the note?

A. I have got a receipt at home. I will bring that.

Record, p.

COCHRANE *et al.*
vs.
DEENER, CISSELL, *et al.*

Received of A. H. Herr, Esq., two hundred and fifty dollars and his note for $250, at one year, being part of the sum of one thousand dollars agreed to be paid in settlement of the above cause. The said settlement includes the privilege of using the invention claimed by the complainants during the continuance of their patents in the Pioneer Mill, in Georgetown.

WALTER S. COX,
President American Middlings Purifier Co.

APRIL 4, 1877.

Q. 170. Did Mr. Welch get a similar receipt or agreement, or did you get one for him?

A. He got a similar one to mine.

Q. 171. Did he call with you on Mr. Cox?

A. No, sir.

Q. 172. Did you not call and ask for a paper of this kind, of Mr. Cox, and tender to him the money?

A. It happened about that time.

A. H. Herr's individual interest in the Welch, Reynolds & Wheeler's patents was only nominal, at the time of settlement.

A. H. Herr, who made the settlement, states his *individual feelings* as to his interest in the Welch, Wheeler & Reynolds' patents.

A. H. Herr, Record, p. 19:

Q. 22. Did you not own some portion of the patents set up in the defendants' answer in the suit of Cochrane *et al. v.* Deener *et al.*, to wit: The patents of Jesse B. Wheeler, April 14, 1863, re-issued February 23, 1875, No. 6,307; the patent of Ransom S. Reynolds, re-issued March 30, 1875, No. 6,361, and the letters-patent of Edwin P. Welch, No. 13,593, re-issued April 1, 1873, No. 5,346?

A. I held an assignment of one of my sons who held an interest, and who assigned that interest as an inducement and compensation to me pecuniarily. *The understanding was that just as soon as I was reimbursed, the interest was to revert back to him.*

Q. 23. What interest did you hold, and what was your son's name?

A. My son's name is Austin Herr; *the interest I really cannot tell you, without looking to the paper;* it was $\frac{1}{16}$ or $\frac{3}{16}$, or something of that sort.

It does not appear that Herr had advanced any money, except one-half of the salary of A. L. Merriman & Co., say nine hundred dollars, and he had received from Jones & Co. one thousand dollars only as license fee.

Herr, Record, p. —:

Cross-Q. 335. I will re-state my question: What amount of money, if any, had you made out of the Welch patents, before the suit of Cochrane *et al. v.* Deener *et al.* was commenced?

A. Do you mean for licenses?

Cross-Q. 336. Yes.

A. One thousand dollars is all we ever received. I was not in the interest of those patents, at least not concerned with the young gentlemen, until some time after they had made a considerable amount.

Mr. Herr maintained profound secrecy to all the other Welchs, and especially to his counsel, as to the settlement.

A. L. Merriman, Record, p. 147:

Q. 17. When did you first hear that Mr. Herr had an understanding with Mr. Cox in connection with this case?

A. I *never* heard that he had any arrangement with Mr. Cox.

Q. 18. Did you ever hear upon what terms or in what way that suit was settled finally; I mean the suit of Cochrane *et al. v.* Deneer *et al.?*

A. No, sir; I do not know that I *ever* did.

And yet, by reference to page — of the motion in this case, it will be found that the mandate was taken out in this court and the decree formally entered in the court below by Mr. Merriman's approval, long after the settlement was reduced to writing.

Cady, Record, p. 104:

Q. 75. When did you hear that Mr. Herr had entered into an arrangement with Mr. Cox concerning the suit?

A. I never heard of it until since I have been here to-day, and I have not heard of it now any further than that one of the gentlemen in the adjoining room—I think it was Mr. Welch—began to tell me something, and I said that I did not want to know anything about it. I presume that it is the subject to which you refer.

A. H. Herr, Record, p. 60:

Q. 408. Did you explain to your counsel, Mr. Merriman and Mr. Cady, the understanding which you and M. Cox had, that in case the suit was decided against you, you and Mr. Welch were to have releases and license, as heretofore stated by you?

A. I think not. I have no recollection.

Q. 409. Why did you not tell your counsel of this agreement?

A. I saw no necessity of doing so.

Q. 410. Had you no other reason for not doing so?

A. None that I can think of at this time.

Q. 418. Do you not think the fact that Mr. Cox declined to put the agreement in writing when you requested it, and the reason that he gave you for not doing so, as stated by you, influenced your mind in not stating that agreement to your counsel?

A. I think not.

Q. 419. Can you state any motive that influenced you in not informing your counsel?

A. I saw no advantage in making it known to them.

Q. 420. Did you ever tell them, even after the decision in the case?

A. I have no recollection that I did.

Q. 421. So far as you know, your counsel *never heard of this agreement until brought out by this investigation?*

A. That is in accordance with my recollection; I have *no recollection of ever having told them of it.*

The only one of the appellees who admits that Herr told him of the settlement which had been made with Mr. Cox before the decision of the Supreme Court was made, was R. W. Welch, and he regarded it as a favorable adjustment, in view of the risk to their mills of injunction.

(Appellee R. W. Welch, p. 112:)

Q. 5. What knowledge have you of the terms of settle-

ment, or of an agreement to settle the case of Cochrane *et al. v.* Deener *et al.?*

A. *Mr. Herr had the entire management of the case*, and, I think, by power of attorney, as well as I recollect, from us, for a certain consideration—a certain interest in the patent, and he managed the case himself. *He had to spend all the money*, and I understood that both our mills and Mr. Herr's had been licensed. I do not exactly recollect the sum, though I think it was $500 for our mill and the same for Mr. Herr's mill.

Q. 6. Under what circumstances did you learn the terms of this agreement?

A. I learned them from Mr. Herr.

Q. 7. When?

A. I do not recollect exactly the date, *but I know it was before the decision of the Supreme Court here.*

Q. 8. How long before?

A. Probably two or three months.

Q. 9. What did he say to you?

A. He said that our two mills would cost a thousand dollars for a settlement.

Q. 10. Did he say they had been licensed?

A. I understood that they were licensed. Yes, sir.

Q. 11. He told you that they were licensed, did he?

A. Yes, sir.

Q. 12. Did he tell you how he came to make this agreement?

A. I do not recollect that he did.

Q. 13. Did he tell you why the other side had agreed to it?

A. My understanding of it was that the matter would go on, on a brief, in order to reach a quick decision. I think that was the arrangement that was made.

* * * * * (Record, p. 114:)

Q. 23. Did not Mr. Herr tell you at the time he told you that part of the money was to be paid by note?

A. No, sir; he did not say anything about the conditions

of the settlement at all, as to how it was settled, but that it was settled.

Q. 24. After he told you that, you did not feel any more care about it, did you?

A. No, sir; I did not.

Q. 25. It relieved your mind of all care and anxiety on the subject?

A. It did.

Manner of Preparing Argument by Appellees.

(Cady, Record, p. 101.)

Q. 45. Did Mr. Merriman give you to understand that he was only going to discuss the question of jurisdiction?

A. I so understood him then. I requested him personally to cover the ground of the mechanical patents also, but he seemed to be disposed to limit himself to the question of jurisdiction.

Q. 46. Do you know why he declined to discuss any other question in his argument?

A. No; I do not.

Q. 47. Did he ever intimate to you that he was not pecuniarily remunerated for any further discussion?

A. I think he did intimate to me that he was not remunerated as liberally as he ought to be.

Q. 41. Did Mr. Herr express any solicitude or anxiety because Mr. Merriman had limited himself to the question of jurisdiction?

A. I do not know that he ever did.

Q. 42. You were present when Mr. Herr and Mr. Merriman was in conference?

A. Yes, sir.

Q. 43. Was Mr. Merriman's argument ever read over to Mr. Herr in your presence?

A. No. I never saw it until it was handed to me afterwards. I tried to see it several times.

Q. 83. I think I asked you if you showed your argument to Mr. Herr at any time during its preparation?

A. I do not think that I did.

Q. 84. You never informed him what points you were going to discuss?

A. No further than in a general way, speaking as I have already testified.

Q. 85. The principal information you derived about the case below and the points there argued was from Mr. Merriman, was it not?

A. And partly from inquiries which I made of Mr. Mason; I went to Mr. Merriman and learned all I could from him, and I then went to Mr. Mason; I understood that the argument of Mr. Davidge below was in the form of notes, and I tried to get those notes, but never succeeded in doing so; Mr. Merriman, I think, said Mr. Mason had them, and Mr. Mason did not feel that he was called upon to let me have them; that is my memory.

Q. 86. You say that besides getting information from Mr. Merriman, you got information from Mr. Mason?

A. I talked with Mr. Mason in regard to the conduct of the case below?

Q. 122. To whom did you apply for the copy of Mr. Davidge's argument for the defendant in the court below?

A. To Judge Merriman and Mr. Mason; I offered to pay one half of the expenses of the stenographer's report on the 17th of October, which offer was declined; Judge Merriman had not the copy of the argument, and therefore I went to Mr. Mason.

Cady, Record: p. 109.

Q. 116. Did you not agree with Mr. Merriman or refer to him the discussion of the defense as to the effect of the prior patent granted to Cogswell & McKiernan?

A. I recall the fact that I especially desired Judge Merriman, in one of our interviews, to cover the ground affected by the Cogswell & McKiernan transactions, and so left that subject with him.

Q. 117. You never knew whether he had treated of it till after the filing of the argument?

A. I did not.

* * * *

Q. 71. Did anybody say anything to you about the question of the identity of the original and reissued patents having been pressed in the court below?

A. I think that Mr. Merriman said something about that, and that was one of the matters which I requested him to cover in his argument. I did not regard that as a point which I wanted to dwell a great deal upon, as he had had the case below. I wanted to dwell more upon this point of process.

Q. 72. You mean the question of infringement?

A. Yes.

Q. 73. Did you notice whether Mr. Merriman's argument treated this question of surrender and reissue or not?

A. After it was filed I noticed that it did not.

Q. 74. Then you did not know what he had treated of until after that?

A. I tried a number of times to see his argument before it was finally submitted, but did not get to see it.

Q. 109. When did you first see the appellants' points in this case?

A. On the day when they were filed.

Q. 110. When did you first see your colleague's argument in this case?

A. The same day.

Q. 111. That is, the day it was filed.

A. Yes, sir.

Q. 112. Had you previously made requests, and endeavored to see your colleague's argument?

A. I had; I find that I had made an entry on the 31st of October, "Saw Judge Merriman as to argument, and proposed reading that of each to the other."

Q. 113. That was never done, was it?

A. Never.

Q. 114. The arguments were not prepared at that time, were they?

A. I understood that they were written substantially. I desired, after hearing all I could, to make any further addition to my manuscript which should seem to be proper.

As soon as this agreement of settlement was made, Mr. Herr paid no attention to the matter of the argument, but drove his own counsel to file their arguments at the dictation of appellants.

A. H. Herr, Record, p. 57:

Q. 394. You have stated that you had the principal conduct of the case, so far as the clients were concerned, in conference with counsel, have you?

A. Yes.

Q. 395. Were you ever shown the appellants' arguments in the Supreme Court of the United States before the appellees' arguments were filed?

A. No, sir; I have no recollection of that sort.

Q. 396. Your counsel never called your attention to what had been said on the other side, did they?

A. No, sir.

* * Record, p. 40:

Q. 226. Did you read his (Cady's) argument before it was filed?

A. No, sir.

Q. 227. Did he ask you to read it?

A. No, sir; I do not remember that he did. The reason why, I suppose——

Q. 228. I do not ask you for your reasons; did you read Mr. Merriman's argument.

A. No, sir; it seems that they had not completed their arguments up to the last moment, and, consequently, it was not in a condition for me to read, and I never read either of them until after the trial.

Q. 229. Did you read any portion of their arguments while they were in progress?

A. No, sir.

Q. 230. Did they ask you to?

A. I do not remember that they did?

Cady, Record, p. 102.

A. 61. Did Mr. Herr or the counsel on the other side say anything to you in reference to the diligence with which you were to prepare this case?

A. I think they urged me pretty often to be ready—crowded me some.

Q. 62. That is all?

A. That is all.

Q. 63. When you say they "crowded" you, what do you mean?

A. They kept urging me for my argument. I was rather pressed at the time, on occasions, and they crowded me for my argument, perhaps not unduly, but that is all I meant.

By Mr. MASON:

Q. 97. Do you not remember that for some weeks after the court met in that year, on account of the absence of attorneys attending to the political campaign, the court had scarcely any business to transact, and finally adjourned over until after the presidential election?

A. I recollect in general the fact that there was a want of attendance to the cases as they were called on the docket, by reason of their political engagements.

Q. 98. And do you not remember that my reason for *urging you forward with the preparation of your case was, that if you could get it submitted while the court was thus unemployed, we would undoubtedly get an early decision in it?*

A. I believe you did give that reason.

Q. 99. And that was because of my anxiety to have the preparation of the arguments hastened?

A. I could not swear to that.

Q. 100. Did I not say so?

A. I think you did give that as a reason

Herr, Record, page 56.

Q. 384. At the time you refused to give him (Cady) more money, did you renew your request to him to be more diligent?

A. I did; up to the very last moment. I told you that I made about five or six visits, or perhaps more; and that I urged them every time to use their best efforts.

Q. 385. Did you repeat that expression to him?

A. Something of that sort perhaps; that is not the identical language, but that is what I meant.

Q. 386. Did you think it necessary to keep urging them.

A. Well, for some reason or other they did not get their arguments up as soon as I expected, and I urged them to do so.

Q. 387. Did the counsel on the other side urge you to urge them, or either of the parties?

A. Yes, sir; they did.

Q. 388. What did they say to you?

A. They wanted me to see that the arguments were attended to.

Q. 689. Did they constantly urge you to see that the arguments were attended to?

A. No, not constantly, but several times, however.

After Herr had relieved himself from anxiety about the suit, he aimed *only* to get the argument made in the Supreme Court as seasonably as possible.

Herr, Record, p. 27:

Q. 91. How long after that did you continue to pay him that money?

A. I cannot tell you; but it was some time before the arguments were written. *I asked Judge Merriman how long it would take him to write the argument, and he stated that he thought he could do it in two or three days. (I am now referring to his argument on appeal in the Supreme Court of the United States.) I said: Now, Judge, suppose I pay you* $100; that will be much better pay than what we have been giving you;" he agreed to take it.

Merriman thus narrates the discussion as to fees, (Record, p. 147:)

Q. 19. Did no discussion, as to remuneration, between you

and Mr. Herr, take place at any time, in connection with the case in the Supreme Court?

A. No, sir; not after the first agreement; of course, we discussed the matter over then a little.

* * * * * *

Q. 33. Can you state to me what passed at this discussion? Give me some idea as to what request you made for fees at the time the discussion took place?

A. I named my fee, and he said he could not afford to give so much, and stated the reason why, and, finally, we agreed upon the smallest fee.

Q. 34. What fee did you request?

A. My impression is, that I asked him $300 for writing an argument, and I do not know but more; I do not recollect exactly.

Q. 35. You say he stated his reason for not giving it to you. What was the reason?

(Mr. Mason objects, on the ground that it is not competent for an attorney to testify to things stated to him by his client, and the answer to this question may involve private matters which it is not proper for an attorney to disclose, nor is he at liberty to disclose them.)

(Mr. Harding says that he declines to proceed further with the examination after this instruction.)

(Cross-examination waived by counsel in opposition to the motion.)

A. L. MERRIMAN.

Herr, Record, p. 56:

Q. 383. And when Mr. Cady told you that the case was bigger than he thought it was, and wanted more money, you declined to give it to him, did you not?

A. Mr. Cady told me that it required more labor than he expected. I think that is about what he stated, and he intimated, though he did not say directly, that he must have more compensation, or that he ought to have; but I told him that he had made his agreement, and I expected him to comply with it, and that was the end of it.

Herr was to furnish *all the* money.

Jas. S. Welch, Record, p. 81:

Q. 35. You understood that the interest which Mr. Herr had in the patents was to be his pay for furnishing the funds to carry on the suit?

A. Yes, sir; that is my understanding of it.

Q. 36. And you understood that he was to have the say as to the payment of counsel; did you?

A. Well, he had the paying to do. That was his business. He got his interest from the Welchs for that.

Geo. W. Cissell, Record, p. 84:

Q. 13. Who had the raising of the money to pay the counsel?

A. I do not know; I suppose Mr. Herr did; he seemed to be the moneyed man.

J. H. Welch, Record, p. 90:

Q. 39. Do you know under what circumstances he got that three-sixteenths, and what he paid for it?

A. I do not think he paid any money; I am sure he did not; it was with the understanding that he should prosecute all these suits to the Supreme Court of the United States.

Q. 40. Including the suits brought under the Wheeler and Reynolds patents and the suit of Cochrane *et al. v.* Deener *et al.*?

A. Yes, sir.

Q. 41. That was included, was it?

A. Oh, yes.

E. P. Welch, Record, p. 111:

Q. 9. Who had charge of the defense of the suit?

A. Mr. A. H. Herr.

Q. 10. Did you regard Mr. Herr as indemnifying you against loss or damage by reason of losing the suit of Cochrane *v.* Deener, so far as the Herr mill was concerned?

A. Yes, sir.

Q. 11. Did any of the defendants furnish any money to defend the suit?

A. No; Mr. Herr furnished it all.

None of other appellees, owners of the patent, except R. W. Welch, were informed of the settlement until after the decision of the Supreme Court.

Jas. S. Welch, Record, p. 81:

Q. 42. Did Mr. Herr notify you or inform you in any way that he had made an arrangement with Mr. Cox as to paying a certain sum of money if the case was decided for the plaintiffs in the Supreme Court of the United States on appeal?

A. He did not.

Q. 43. When did you first hear that he had made an arrangement with Mr. Cox about the amount to be paid?

A. As well as I can remember, it was about the winding up of the business here in the Supreme Court of the United States.

Q. 44. Do you mean about the time of the decision being rendered?

A. Yes; as well as I can remember, that was about the time, I think; probably after.

Jas. H. Welch, Record, p. 86:

Q. 2. Were you one of the defendants in the suit of Cochrane *et al. v.* Deener *et al.?*

A. Yes, sir.

Q. 3. When did you first hear that a settlement had been made between Mr. Herr and the plaintiffs in that suit, by which you were to pay a certain sum of money?

A. I think it was after the decision of the Supreme Court of the United States on appeal, as well as my memory serves me.

Q. 4. How did you find it out; who told you?

A. I think it came through Mr. Deener, the senior member of our concern at that time.

E. P. Welch, Record, p. 111.

Q. 2. Were you one of the defendants in the suit of Cochrane *et al. v.* Deener *et al.*?

A. I was.

Q. 3. When did you first hear that a settlement had been agreed upon in case the suit was decided in favor of Cochrane on the appeal in the Supreme Court of the United States?

A. I knew that there was a settlement after the decision was made in the Supreme Court of the United States, and not before then.

Q. 4. How did you come to hear of it then?

A. Mr. Herr told me.

Q. 5. What did he tell you?

A. He told me that he had made a settlement for $500 for his mill, and $500 for my father, Jas. S. Welch's mill.

Q. 6. Did you take any part in the conduct of the suit of Cochrane *v.* Deener?

A. No.

Geo. W. Cissell, Record, p. 83.

Q. 4. When did you hear that an agreement had been entered into between Mr. Herr and Mr. Cox for the settlement of that matter?

A. I cannot say when I heard it; whether it was the time the money was paid, or whether I heard it before. I do not think I heard it before the money was to be paid. The way I knew it then was that we (Deener, Cissell & Welch) advanced the $250 for Mr. Welch; we would have owed him money on rent, and we advanced the $250 for him.

Q. 5. Did you take any interest or care yourself in the suit below or in the court above?

A. No, sir.

Mr. Cady was not employed to replace Davidge until after Herr's settlement with Cox.

A. H. Herr, Record, p. 40.

Q. 217. Do you think it was afterwards?

A. I reckon it was.

Herr's manner of introducing subject to counsel:

Q. 214. Did you say anything to Judge Merriman about the argument?

A. After employing Judge Cady, I introduced him to Judge Merriman, and said: "Now, gentlemen, I turn the case over to you; I want it managed in the best way you can."

As to costs of suit, Herr had no knowledge of them whatever.

A. H. Herr, Record, p. 46.

Q. 287. Have you paid the costs of court in this case in the court below or in the Supreme Court of the United States?

A. No, sir; I do not remember of ever paying any.

Q. 288. Has any bill been sent to you for those costs?

A. No, sir; I have no recollection of it.

Q. 289. You never paid it if it has been sent to you?

A. I know that.

Q. 290. Has nothing been said to you about it that you can recollect?

A. No, sir; *I have not the slightest recollection of a word ever having been said to me on the subject.*

W. Cox, Record, p. 119:

"There was nothing said about the costs in our agreement."

W. Cox, Record, p. 122:

Cross-Q. 21. Do you know what that bill of costs amounted to?

A. My impression is that it was either $270 or three hundred and seventy odd dollars.

Cross-Q. 23. The costs were the costs in the Supreme Court of the United States?

A. Yes, sir.

* * * * * * *

W. Cox, Record, p. 123:

Cross-Q. 34. Have you ever applied to have the costs taxed in the Supreme Court of the District of Columbia?

A. No.

Appellee's arguments were not submitted under the rule of court.

The rule of this court allows ninety days for the filing of printed arguments; but after the settlement between Herr and Cox, everything was progressed with lightning speed. Mr. Cady's retainer was actually paid on the 9th of October. (See his testimony, Record, p. 108, q. 108.)

The appellants filed the copies of records used below in this court. Mr. Cady prepared and filed his argument before he saw appellants' points. The records were filed on 5th of October, and the stipulation was then filed for first time, although entitled in suit below, and dated April 8, 1876.

EXHIBIT "L."

Abstract of Bill filed in the suit of the American Middlings Purifier Company v. *John A. Christian, Cadwalader C. Washburn, and others, in the Circuit Court of the United States for the District of Minnesota. Record, p.* 175.

Bill sets forth grant of original patent No. 37317, 37318, 37321, to Cochrane and others; grant of reissued patent No. 5841; assignment to plaintiffs; the charge of infringement; and that William F. Cochrane and others filed their certain bill of complaint in the Supreme Court of the District of Columbia against Josiah W. Deener *et al.*, alleging, among other things, the infringement of said reissued letters patent No. 5841; that the defendants appeared and answered in said suit, and in their said answer denied the allegations of the said bill, and set up in further defense prior knowledge and use by other than said Cochrane of the invention set forth and claimed in said reissued letters patent, and that said Cochrane was not the original and first inventor thereof.

That issue was duly joined on said pleadings, and testimony was taken at great length by both the complainants and defendants, and that, after hearing counsel for complainants and defendants, the said court dismissed the bill.

That thereupon an appeal was taken to the Supreme Court of the United States, and said appealed cause was argued before said appellate court, and decided at the October Term thereof, 1876. That by decision of said court, it became *res adjudicata;* that said Supreme Court of the District of Columbia, sitting in equity, had jurisdiction of said bill; that said parties complainant were the owners of said reissued letters patent; and further, that the defendants therein had infringed the said reissued letters patent upon which this suit is brought. That the said reissued letters patent were good and valid in law, and were not anticipated by any of the priorities set forth in said answer or in the evidence taken in said cause.

And these complainants aver and charge the fact to be, that the process used by the defendants herein is substantially the same as that used by the defendants in the said cause, held, as aforesaid, by the Supreme Court of the United States to have infringed the reissued letters patent upon which this suit is brought

And these complainants further pray that the defendant may be enjoined during the pendency of this suit from such infringement.

That they may be perpetually enjoined from such infringement.

That they may be decreed to pay the costs of this suit.

And that damages to the amount of *three hundred thousand dollars*, to be assessed as by statute provided, may be adjudged to these complainants against the defendants for such violation of their said exclusive rights, and for their infringement, and for other and further relief, may it please your Honors to grant unto these complainants.

Sworn to by Rodney Mason, May 23d, 1877.

Extract from injunction order in above case. *Record, p.* **177.**

And now, at the general June term, 1877, of this court, holden at Saint Paul, in said district, their Honors Judges Miller and Nelson presiding, a motion having been duly made upon notice to the defendants, by the counsel for the complainant. for a preliminary injunction against the defendant, as prayed in the bill of complaint herein, and having been duly presented and argued upon the bill and affidavits presented by both plaintiff and defendants:

Now it is ordered that the motion of the complainant herein be, and the same is hereby granted, and that a preliminary writ of injunction in this cause issue out of and under the seal of this court against the detendants in this action, restraining them and each of them, their officers, servants, agents, attorneys, confederates, workingmen, and employees from further infringing the process of manufacturing flour, charged in the bill of complaint herein to be invented by and patented to William F. Cochrane, and now owned by the complainant, as the same is described and claimed in reissued letters patent No. 5841, and that they and each of them stand enjoined from manufacturing flour by the process described in said reissued letters patent No. 5841, until the final decree in the above-entitled cause: *Unless*, within ten days from the service of this order upon the defendants, or their solicitor in this cause, Gordon E. Cole, Esq., the defendants shall execute to the complainant and file in this cause a bond, with good and sufficient sureties, to be approved by his Honor Judge Nelson, in the sum of two hundred and fifty thousand dollars; *Conditioned*, That said defendants, once in three months, shall and will render a true account, under oath, and file the same with the clerk of this court, showing the amount of flour manfactured by them under the process in question during the pendency of this action, the final account to be rendered and filed on or before the first day of September next, and to include all flour manufactured by them as aforesaid since the commencement of this action; and *conditioned*, also, that the said defendants shall and will pay the complainant, its successors, and assigns, such sum of money as may finally be adjudged and decreed to be paid by them in this suit.

R. R. Nelson,
Judge.

I should perhaps have stated before that among the papers which I signed as solicitor was a stipulation, a copy of which is set out in our printed answer to this motion. This stipulation Colonel Mason brought to me to sign, and it was drawn up, I think, in the handwriting of Mr. James A. Maloney, and signed by Mr. Merriman, as solicitor for the defendants; whether before or after I signed it, I do not remember. This was a stipulation about submitting the case on printed arguments. It is on file now in the office of the clerk of the Supreme Court of the United States. While the record was being prepared for the Supreme Court, Mr. Herr informed me that Mr. Davidge had advised the defendants not to carry out the stipulation for submitting the case upon printed arguments. I believe I expressed some surprise, and said it would be better for them to do it, and nothing else took place then. Some time afterwards Mr. Herr called again, and he told me that the defendant had resolved not to carry out that stipulation unless we would agree beforehand upon some scheme for pooling the patents, and would release them from all damages. I told Mr. Herr that the claim was utterly preposterous; that we could not not listen to anything of the sort, and that if the parties proposed to act in that manner I would not have any further communication with them about the case. I told him further that we should go on to carry out the stipulation as far as we could, and would file the record, that Col. Mason would submit his printed argument, and that I would file that stipulation in the Supreme Court, and see if we could get the court to enforce it. The record was brought up and the stipulation was filed here, and I did not expect to hear anything further from the defendants.

Some time after that Mr. Herr called anew with another proposition. He said that if we would agree upon a sum certain, which should cover all claims for damages for the past use of this machinery in the mills in Georgetown, and also for the future use during the continuance of our patent, he could get the defendants to carry out this agreement for the submission of printed arguments, and not otherwise. I told him I would have to submit that to the other gentlemen in interest. I consulted Mr. Mason and Mr. Charles F. Peck, the only other practicing lawyers be-

sides myself in our party, except Mr. Phillip, who was out of town. While we were all averse to entering into any negotiations with the defendants pending the suit, we agreed that there was no legal objection to ascertaining the amount of our money demands in advance, and that if the hearing could not be speeded otherwise, it had better be done. I think that the sum of $2,000 or $2,500 was suggested as a basis for such an arrangement, and I mentioned that to Mr. Herr. He had to consult with his associates, and he came backwards and forwards, and we had several meetings, and could not agree upon any terms involving a larger amount than $1,000, and he endeavored to beat me down considerably below that, but I refused to fix upon anything lower; and finally we arranged that if he would have the defendants carry out this stipulation for submission, in case of our ultimate success, we would not exact more money than $1,000 for the past and future use of the machinery in these mills. The use of the machinery in any other mills, or of similar machinery in any other mills, and the interest in the invention in controversy, were not the subject of our arrangement at all, but were considered as left to be fought over in this suit.

Mr. Herr, I think, states it too strongly when he says that I peremptorily refused to give any written agreement. I did not give a written agreement, but I did not assign as a reason for it that such an agreement, written or oral, would taint the case, as might be inferred from his testimony—though I do not think he meant to say that. But I did not give a written agreement because, first, I was not prepared with anything at the time, and did not wish to draft any paper hastily which might be susceptible of misconstruction, and if I should give a paper at all I preferred to prepare it deliberately. Another reason why I was loth to give any written obligatian was—and this I rather think I mentioned to him—that we had nothing from the defendants, and had no guarantee that they would carry out the stipulation, and from what had occurred I had no confidence that they would; and I was loth, therefore, to give any written obligation which would be one-sided, and which they might make some sinister use of if they should finally conclude to repudiate this agreement. I therefore gave Mr. Herr simply our verbal assurance as to the limit of our pecuniary demand in case of our success, conditioned upon the faithful performance of the stipulation, and he was satisfied with it.

invention to complainant, James A. Maloney, as will more fully appear by reference to said deeds, to be produced when required; and complainants aver that said Maloney became and was the sole owner and proprietor thereof.

Your orators further state that on the 23d day of February, 1875, the said letters-patent were, with the assent of said assignee, surrendered by said patentee, and the same were, by the Commissioner of Patents, reissued to said Wheeler, assignee to said Maloney; copies of the specification of which letters-patent so reissued as aforesaid are herewith filed, and the original made part hereof for greater certainty, which are numbered 6,307.

Your orators further state that on the tenth day of February, 1875, said Maloney assigned to complainants, Herr, James S. Welch, Edward P. Welch, Rosia W. Welch, and to Herbert P. Welch, (the latter since deceased,) certain undivided interests in said letters-patent, as will appear by reference to said assignment, to be produced, and which is to be made part hereof, for greater certainty; and complainants aver that they, after said Herbert P. Welch, there and by reason of the premises, became and were the exclusive proprietors and owners of said invention, so secured by said letters-patent, and the reissue thereof, as aforesaid.

Complainants further state that on the 23d day of June, A. D. 1863, the United States granted and issued to Ramond S. Reynolds, who was a citizen of the United States, and who was the original inventor and discoverer of certain other improvements in a machine for cleaning grain and other materials, and who had complied with all the requirements of law in that behalf, letters-patent numbered 38,985, certified copies of which will be produced, the original of which letters-patent were by said patentee surrendered, and the same were, on the 30th day of March, 1875, reissued by the Commissioner of Patents to said Reynolds, assignee to complainants, and Herbert P. Welch, which reissue is numbered 6,361, the copies of the specifications of which are herewith filed, and the original of which letters-patent so reissued will be produced on the hearing or certified copies of the same.

Your orators further state that prior to the reissue thereof, as aforesaid, they and the said Herbert P. Welch became the exclusive owners and proprietors of said inven-

tion, so secured by said letters-patent, by mesne conveyance from said Reynolds.

Complainants further state that said Herbert P. Welch became deceased intestate on the 9th day of April, 1875, and that letters of administration were granted upon his estate to James S. Welch by the Supreme Court of the District of Columbia, as will more fully appear by reference to the same, certified copies of which will be produced on hearing.

Your orators further state that the defendants are using a machine or machines for cleaning and purifying flour and meal so constructed as to embrace the improvements contained and specified in one or both of said letters-patent, and your orators have reason to believe they will continue such use; that the defendants refuse to account to complainants for any portion of the profits which they have made or are making by such unlawful use, or to desist from the use thereof, in violation and infringement of complainants' rights so secured to them as aforesaid.

Complainants further state that they have no actual knowledge of the gains and profits received by defendants from the use of such machines; neither do they know the number of machines so used; but they aver that defendants have derived and received, and are still deriving, large gains and profits from such use; that defendants are largely engaged in the manufacture of flour in the city of Saint Louis, in the State of Missouri; that by the use of such inventions and improvements described and set forth in said letters-patent the quantity of merchantable flour from wheat is greatly increased, and the quality of the higher grade of the flour is greatly improved, and your orators believe, and therefore charge, that such gains and profits so made by the use of such machines are or exceed the sum of five hundred dollars per day, but for the reason that they have no actual knowledge of such gains and profits, nor of the number of machines so used, or of the amount of wheat by said defendants so manufactured into flour, your orators pray a discovery thereof.

All which acts and doings of defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators, and inasmuch as they have no full or adequate relief at hand, your orators pray:

1st. That the usual process of subpœna issue to defendants.

2d. That they and each of them be required to answer under oath each and every allegation in this bill contained, and particularly that they answer and disclose the gains and profits derived by them from the use of such machines; that they state particularly the number of machines used by them in the cleaning and purifying the middlings of flour, and particularly the manner of the construction of the same, and each one of them, and if in conformity to any pretended patented device, state particularly under what letters-patent it is claimed to be constructed, and the number of bushels of wheat daily manufactured by them into flour.

3d. That an account be taken of such gains and profits, and that defendants be decreed to pay the same to complainants with such damages as to the court shall seem meet and proper, and that a writ of injunction may issue restraining and enjoining perpetually defendants, their agents, servants, and workmen from the fnrther use of said improvements, so described and set forth in said letters-patent, respectively, and for such other or further relief as to the court shall seem meet and proper.

And as in duty bound your orators will ever pray, &c.

ABRAHAM H. HERR,
JAMES S. WELCH,
EDWARD P. WELCH,
ROSIA W. WELCH,
JAMES H. WELCH,
JAMES A. MALONEY,
JAMES S. WELCH,
Adm'r of Herbert P. Welch, dec'd.

—

STATE OF MISSOURI, }
County of St. Louis. }

James A. Maloney, one of the above-named complainants, being duly sworn, says that the foregoing bill is true, except as the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JAMES A. MALONEY.

Subscribed and sworn to this 17th day of Jan'ry, 1875, before me, a notary public for and within the county of St. Louis, State aforesaid, duly qualified on the 7th day of January, 1874, and whose term of office will expire on the 17th day of December, 1877.

[SEAL.] M. J. SULLIVAN,
Notary Public, for St. Louis Co., Mo.

NATHAN FRANK,
Sol'r for Compl'ts.

—

And afterwards, to wit: on the 20th day of September, A. D. 1876, at a regular stated term of the circuit court of the United States, in and for the eastern district of Missouri, begun and held in the said district, at the city of St. Louis, on Monday, the 18th day of September, A. D. 1876, the following proceedings were had and appear of record in said cause, to wit:

A. H. HERR *et al., Complainants,*
vs.
E. O. STANARD *et al., Defendants.*

This day came the complainants, by their solicitor, Nathan Frank, Esquire, and dismiss the bill of complaint herein.

—

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

I, M. M. Price, clerk of the circuit court of the United States, in and for the Eastern District of Missouri, do hereby certify that the foregoing is a true and correct copy of bill in equity, filed May 27, 1875, in case of A. H. Herr *et al. vs.* E. O. Stanard *et al.*, and dismissal of said cause, as fully as the same remains on file and of record in said case, in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis,

in said district, this 27th day of November, 1877, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL.] M. M. PRICE.
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Endorsement:) No. 550. United States Circuit Court, eastern district of Missouri. A. H. Herr *et al. against* E. O. Stannard *et al.* Duly certified copy of bill in equity and dismissal of cause in the above-entitled cause.

EXHIBIT "H."

THE UNITED STATES PATENT OFFICE.

[Vignette.]

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the digest of this office of all assignments, agreements, licenses, powers of attorney, and other instruments of writing found of record under, or relating to, reissued letters-patent granted to E. P. Welch, assignor to self, J. H., R. W., and H. P. Welch and J. A. Maloney, No. 5,346, April 1, 1873, for "middlings purifier."

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
E. P. Welch, Jas. H. Welch, and R. W. Welch.	J. S. Welch, and A. H. Herr.	April 22, '74.	April 27, '74.	"Middlings Purifier," re-issued April 1, '73, No. 5,346, and other patents.	A full three-sixteenths undivided interest of the entirety of said letters-patent.	X 17.	138
E. P. Welch, Jas. H. Welch, R. W. Welch, Prince H. Welch, and J. A. Maloney.	Same.	April 25, '74.	" " "	Same.	Power of attorney to transact, conduct, and carry on the business of introducing and selling said machines, and the right to use the same. Nothing herein contained shall be construed, however, as vesting said Welch and Herr with power to dispose of territorial rights, and all the parties hereto agree that no sale or disposition shall be made by either or any of them of the whole or any part of the interest which they own in said patents without the consent of the others first had and obtained.	X 17.	139
Jas. A. Maloney.	A. H. Herr, J. S. Welch.	Sept. 3, '74.	Sept. 3, '74.	Same.	Revocation of power of attorney, dated April 25, 1874, so far as it relates to one-eighth undivided interest held by said Maloney.	I 18.	239
E. P. Welch, J. H. Welch, R. W. Welch, of the 1st part; J. A. Maloney,	J. S. Welch, A. H. Herr, of the 3d part.	April 22, '74.	" " "	Same.	Statement that said parties of the first part are to assign to said parties of the third part a sufficient portion of their interest in said patents to constitute said parties of the third part,	K 18.	97

H. P. Welch, of the 2d part.					jointly, equal owners with them in said patents, that is to say said parties of the first part shall each assign to said parties of the third part one-sixteenth part of the entirety, in which event the ownership of the $\frac{3}{4}$ of the entirety now held by the parties of the first part shall be distributed in the proportion of 3-16 to E. P. Welch, a like interest to J. H. Welch, a like interest to R. W. Welch, and the remaining 3-16 to J. S. Welch and A. H. Herr. Also an agreement that neither of the parties hereto shall sell or dispose of any part of his interest without the consent of the others first had and obtained. Also an agreement relative to the management and sale of rights to use said machines. For particulars and conditions see Record.		
J. A. Maloney.	A. H. Herr, J. S. Welch,	Dec. 5, '74.	Dec. 5, '74.	"Middlings Purifier," re-issued April 1, '73, No. 5,346, and other patents.	Renewal of all the powers conferred upon said assignees by a power of attorney, recorded in Liber X 17, page 139.	U 18.	26
Agreement between the following parties:	Jas. S. Welch, A. H. Herr, E. P. Welch, J. H. Welch, R. W. Welch, and	May 13, '75.	June 2, '75.	Same.	The parties of the first part hereby license the parties of the second part to use such inventions and improvements in their said mill, in New York city, embracing six run of stone on wheat, for the full term of	E 19.	428

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
	J. A. Maloney, of the 1st part; and Jones and Company, of the 2d part.				said letters-patent. Said parties of the second part further agree to pay said parties of the first part the sum of one hundred dollars for every additional run of stone on wheat in their said mill or elsewhere.		
J. A. Maloney.	A. H. Herr.	Feb. 23, '76.	Feb. 24, '76.	"Middlings Purifier," re-issued April 1, '73, No. 5,346, and other patents.	Assigns his undivided eighth interest in the said several letters-patent to the said Herr, IN TRUST for the purposes mentioned in this assignment. For the terms and conditions of which see Record.	H 20.	51

EXHIBIT "I."

THE UNITED STATES PATENT OFFICE.

[Vignette.]

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the digest of this office of all assignments, agreements, licenses, powers of attorney, and other instruments of writing, found of record under, or relating to, reissued letters-patent granted to Jesse B. Wheeler, assignor, by *mesne* assignments, to James A. Maloney, No. 6,307, February 23, 1875, for "grain drier."

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
Agreement between the following parties:	Jas. S. Welch, A. H. Herr, E. P. Welch *et al.*, of the first part; and Jones and Company of the second part.	May 13, '75.	June 2, '75.	"Grain Drier," reissued Mar. 30, '75, No. 6,361, and other patents.	The parties of the first part hereby license the parties of the second part to use such inventions and improvement in their said mill, in New York city, embracing six run of stone on wheat, for the full term of said letters-patent. Said parties of the second part further agree to pay said parties of the first part the sum of one hundred dollars for every additional run of stone on wheat in their said mill or elsewhere.	E 19.	428
J. A. Maloney.	A. H. Herr.	Feb. 23, '76.	Feb. 24, '76.	Same.	Assigns his undivided eighth interest in the said several letters-patent to the said Herr, IN TRUST for the purposes mentioned in this assignment. For the terms and conditions of which see Record.	H 20.	51

EXHIBIT "K."

THE UNITED STATES PATENT OFFICE.

[Vignette.]

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the digest of this office of all assignments, agreements, licenses, powers of attorney, and other instruments of writing found of record under or relating to re-issued letters-patent granted to Ransom S. Reynolds, assignor by mesne assignments to Jas. A. Maloney, Jas. S. Welch, Abraham H. Herr, and Edward P., Jas. H., Rosia W., and Herbert P. Welch, No. 6,361, March 30, 1875, for "Grain Drier."

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

Assignors.	Assignees.	Date of Assignm't.	Date of Record.	Invention.	Territory Assigned.	Liber.	Page.
Agreement between the following parties:	Jas. S. Welch, A. H. Herr, E. P. Welch, J. H. Welch, R. W. Welch, and J. A. Maloney, of the first part; and Jones & Co., of the second part.	May 13, '75.	June 2, '75.	"Grain Drier," reissued Feb. 23, '75, No. 6,307, and other patents.	The parties of the first part hereby license the parties of the second part to use such inventions and improvements in their said mill, in New York city, embracing six run of stone on wheat, for the full term of said letters-patent. Said parties of the second part further agree to pay said parties of the first part the sum of one hundred dollars for every additional run of stone on wheat in their said mill or elsewhere.	E 19.	428
J. A. Maloney.	A. H. Herr.	Feb. 23, '76.	Feb. 24, '76.	Same.	Assigns his undivided eighth interest in the said several letters-patent to the said Herr, IN TRUST for the purposes mentioned in this assignment. For the terms and conditions of which see Record.	H 20.	51

COMPLAINANT'S EXHIBIT No. 1.

[65.]

DEPARTMENT OF THE INTERIOR,

[Vignette.]

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting :

This is to certify that the annexed is a true copy from the records of this office of the reissue letters-patent granted Maloney, Welch, Herr, and Edward P., James H., Rosia W., and Herbert P. Welch, dated March 30, 1875—No. 6,361, for improvement in grain driers.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

—

No. 6,361. Reissue.

THE UNITED STATES OF AMERICA.

[Vignette.]

To all to whom these presents shall come :

Whereas, Ransom S. Reynolds, of Waterbury, Connecticut, assignor by mesne assignments to James A. Maloney, James S. Welch, Abraham H. Herr, Edward P. Welch, James H. Welch, Rosia W. Welch, and Herbert P. Welch, has presented to the Commissioner of Patents a petition, praying for the reissue of letters-patent for an alleged new and useful improvement in grain driers, (for which letters-patent were issued to him, dated June 23, 1863; which letters having been surrendered, the same have been cancelled, and new letters ordered to issue to said assignees on an amended specification,) a description of which invention is contained in the specification, of which a copy is hereunto annexed and made a part hereof,

and has complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters-patent are granted unto the said Maloney, Welch, Herr, and Edward P., James H., Rosia W., and Herbert P. Welch, their heirs or assigns, for the term of seventeen years from the twenty-third day of June, one thousand eight hundred and sixty-three, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-five, and of the independence of the United States of America the ninety-ninth.

[SEAL.]

C. DELANO,
Secretary of the Interior.

Countersigned:

J. M. THACHER,
Commissioner of Patents.

UNITED STATES PATENT OFFICE.

Ransom S. Reynolds, of Waterbury, Connecticut, assignor, by mesne assignments, to James A. Maloney, James S. Welch, Abraham H. Herr, Edward P. Welch, James H. Welch, Rosia W. Welch, and Herbert P. Welch.

IMPROVEMENT IN GRAIN-DRIERS.

Specification forming part of letters-patent No. 38,985, dated June 23, 1863; reissue No. 6,361, dated March 30, 1875; application filed March 22, 1875.

To all whom it may concern:

Be it known that I, Ransom S. Reynolds, of Waterbury, county of New Haven, in the State of Connecticut, have invented certain new and useful Improvements in an Ap-

paratus for Drying, Cooling, and Cleaning Grain, &c.; and that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making a part of this specification, in which—

Figure 1 represents an elevation of one of the sides of the apparatus, showing the driving-gear. Fig. 2 represents a vertical longitudinal section through the same. Fig. 3 represents a top plan.

Similar letters of reference where they occur denote like parts of the apparatus in all the figures.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings.

A represents a case for inclosing the apparatus, said case being furnished with such openings only as are necessary for the inlet and exit of the heated and cool or dry air as may be necessary for acting on the grain or other material, carrying off the dust or other impurities.

The moving parts of the apparatus may be driven as follows: A pulley, B, driven by a crank or from any first-moving power, has around it an endless belt, C, which is twisted and passed around another pulley, D, to give it motion. From a pulley, E, on the same shaft with the pulley D, passes an endless belt, F, which passes around a pulley, G, on the fan-shaft of the fan-blower H, that supplies the air that is to be used for drying and cleaning, as well as the cool air for cooling the grain or other material, as will be hereinafter explained. From a third pulley on the same shaft with the pulleys D E passes an endless belt, I, to and around a pulley on the same shaft with, but concealed by, the pulley J, and from J, another belt, K, passes around L, and from a pulley behind L a belt, M, passes to and around a pulley, N. From a pulley on the same shaft with those D E a belt, O, passes to and around a small pulley, *a*, on the end of the upper fan-shaft, *b*, as seen in Fig. 3, and on this fan-shaft there is a cam-wheel, *c*, that gives a vibrating motion to an arm, *d*, Fig. 1, pivoted at *e*, the further end of said arm being connected to a riddle or screen, *f*, for taking out any coarse impurities from the grain or other material before it enters the machine or apparatus to be dried, cooled, and cleaned. At the lower side of the case is a pulley, P, which may get its

motion from the first motor or from the pulley B, as may be found most advantageous. On the shaft of the pulley P there is a pinion that works into the gear-wheel Q, and gives said gear-wheel its motion, and this gear-wheel, by means of interior pinions *g* on the same shaft with itself and interior gear-wheel R and chain-wheels *h* on other shafts, but driven by the pinions *g*, give motion to the endless perforated moving apron or screen S. The shaft carrying the pully B has a pinion upon it that gears with and drives the cog-wheel T, on whose shaft there are also placed, inside of the case, pinions *i*, that gear with cog-wheels U behind, but on the same shaft with, the chain-wheels V, for carrying and moving the upper perforated moving apron or screen W, for which the chain-wheel V also acts as a supporter. The shafts of the pulleys J L N, which pass through the machine, are supported in hinged arms *n*, so that they can rise or fall without slacking their belts, and these shafts carry a series of stirrers, *j*, (there being several on each shaft,) for moving the grain or other material on the apron or screen W as it is carried through the machine.

The fan X on the shaft *b*, and driven by the belt O and pulley *a*, is a suction-fan, which draws from the inside of the apparatus, and from above the perforated apron or screen, all the light dust and impurities loosened from the grain or other material by the stirrers, or by its transit through the machine, and expels it through the trunk or trough Y out of the machine. The dust, &c., drawn to the suction-fan comes up through vertical passages *j'*, and thence to the eyes of the fan-case.

k k are recesses, in the bottoms of which are valves opening outward from the current of air drawn toward the fan. In these recesses much of the heavier impurities will fall and settle, there being an eddy or calm in them, and when filled access can be had to them through openings Z in the sides of the case to empty them of the accumulation therein.

The grain or other material to be dried, cooled, or cleaned is admitted into the hopper *l*, and thence passes over the shaken riddle or screen *f* onto a guiding-board, *m*, and from thence through an adjustable opening, *o*, and passage *p*, onto a guiding-board, *q*, and adjustable throat

r, onto the endless moving apron or screen W, which carries it forward, while the stirrers J are constantly agitating it in its passage. The grain or other material having reached the turn at the end of the traverse of the moving apron or screen W, falls upon a guiding-board, *s*, and passes thence through an adjustable opening, *t*, onto a screen, *u*, and thence through a self-acting throat, *v*, onto the second endless moving apron or screen S, at the end of which another self-acting throat, *w*, is arranged, where the grain or other material which has been cooled and cleaned on the apron S is delivered into a spout, and conducted out of the machine at *x*.

y is a furnace set in a chamber, *z*, so that its heat will only be carried into such parts of the apparatus as may be desirable by pipes or passages, the furnace being separated by suitable partitions from the chambers and passages of the machine. The pipe 1 is a smoke-flue for carrying off the gases, &c., the pipe 2 brings a volume of air from the fan-blower H, and delivers it against the furnace in the furnace-chamber *z*, where it is heated, if desired, and by the pressure in said chamber driven through pipes 2′ into the drying and cleaning chamber, so that it may envelop the moving apron or screen W, and pass through the perforations thereof, and thus dry and clean the grain or other material. In that chamber the suction-fan X, superinducing an upward tendency to the air, draws it as it becomes heavy by its absorption of whatever moisture it finds in the grain or other material, as well as the impurities it gathers, and carries it up and throws it out of the machine by means of an air duct or trunk.

The pipe 3 communicates at its upper end with the fan-chamber 4, and the air forced into this pipe at its upper end by the fan-blower H is forced down through said pipe, and discharged underneath the lower perforated apron S, and disseminates itself throughout the chamber in which this apron moves, for the purpose of cooling the grain or other material.

The material to be dried or cleaned, in passing over the screen *u*, is freed from any impurities not previously taken out of it, and these impurities may pass off at 5 and out of the machine.

The inlets at *o v* and the exits at 6 *t w* are self-adjust-

ing, while the others are adjustable by hand. The self-adjusting passages prevent the air from escaping, while the passage of the grain or other material is not incommoded thereby.

I have shown two aprons or screens, the upper one delivering the material to be dried or cleaned upon the next one below it, and the two belts moving in opposite directions; but the number of belts may be increased, each delivering in turn upon the next one below it, and they may be run in the same direction, if preferred.

It is not necessary that the pipe 3 should pass through the furnace-chamber, and is simply placed there for convenience for representing the invention, for, as its duty is to carry cool air from the fan chamber or blower to the apron or screen S, it may be arranged elsewhere or outside of the furnace-chamber.

Having thus fully described my invention, what I claim therein as new, and desire to secure by Letters-Patent, is—

1. The combination, in a machine for drying, cooling, or cleaning grain or other material, of a horizontal movable apron or screen within an air-tight case, a blower-fan for producing an air-blast, auxiliary air-pipes connected with said fan to convey the air generated by the blower-fan immediately beneath said horizontal movable apron or screen, thereby causing the air to pass up through the perforations of the same, and a suction or exhaust fan and discharge duct or trunk connected with the chamber above the horizontal movable apron or screen, substantially as and for the purpose set forth.

2. In a machine for drying, cooling, or cleaning grain or other material, the combination of a horizontal movable apron or screen within an air-tight case, an air-blast from a fan-blower beneath it and auxiliary air-pipes, an exhaust or suction fan connected with the upper portion of said horizontal movable apron or screen, automatic valves for feeding and delivering the grain or other material, and preventing the entrance and exit of air with the grain or other material, substantially as and for the purpose set forth.

3. In a machine for drying, cooling, or cleaning grain or other material, the combination of a horizontal movable

apron or screen within an air-tight case, with adjustable feed-regulator, an exhaust or suction fan, two or more eddy or calm chambers arranged above said horizontal movable apron or screen, substantially as and for the purpose set forth.

RANSOM S. REYNOLDS.

Witnesses:
JESSE B. WHEELER,
JOHN W. WEBSTER.

COMPLAINANT'S EXHIBIT No. 2.

[65.]

DEPARTMENT OF THE INTERIOR,

[Vignette.]

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the reissue letters-patent granted James A. Maloney, dated February 23d, 1875, No. 6,307, for improvement in grain driers.

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

No. 6,307. Reissue.

THE UNITED STATES OF AMERICA.

[Vignette.]

To all to whom these presents shall come:

Whereas Jesse B. Wheeler, of Bolton, Massachusetts, assignor by mesne assignments to James A. Maloney, of

Georgetown, District of Columbia, has presented to the Commissioner of Patents a petition praying for the reissue of letters-patent for an alleged new and useful improvement in grain driers, (for which letters-patent were issued to him, dated April 14, 1863, which letters having been surrendered the same have been canceled and new letters ordered to issue to said assignee on an amended specification,) a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law: Now, therefore, these letters-patent are to grant unto the said James A. Maloney, his heirs or assigns, for the term of seventeen years from the fourteenth day of April, one thousand eight hundred and sixty-three, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth.

[L. S.]

B. R. COWEN,
Acting Secretary of the Interior.

Countersigned:
J. M. THACHER,
Commissioner of Patents.

—

UNITED STATES PATENT OFFICE.

Jessee B. Wheeler, of Bolton, Massachusetts, assignor, by mesne assignments, to James A. Maloney, of Georgetown, D. C.

IMPROVEMENT IN GRAIN-DRIERS.

Specification forming part of Letters-Patent No. 38,191,

dated April 14, 1863; reissue No. 6,307, dated February 23, 1875; application filed February 10, 1875.

To all whom it may concern:

Be it known that I, Jesse B. Wheeler, of Bolton, in the county of Worcester and State of Massachusetts, have invented a new and useful Improvement in Machines for Drying, Cooling, and Cleaning Grain, Flour, Meal, and other similar articles; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings, making a part of this specification, in which—

Figure 1 represents a side elevation of the machine. Fig. 2 represents an end view thereof. Fig. 3 represents a vertical, longitudinal, and a central section through the machine. Fig. 4 represents a vertical transverse section; and Fig. 5 represents, on an enlarged scale, one of the stirrers and its connections and mode of adjustment.

Similar letters of reference, where they occur in the several figures, denote like parts of the apparatus in all the drawings.

To enable others skilled in the art to make and use this invention, I will proceed to describe the same with reference to the drawings.

A represents an air-tight case, which is furnished with suitable air inlet and exit passages, commanded by valves or registers, as will be hereinafter explained. At one end of the case there is a hopper or feeding-passage, B, the entire width of the screen, and commanded by a slide, *a*, by which said passage may be enlarged or diminished, as it may be desirable to feed in the grain or other material to be dried, cooled, and cleaned, in greater or less quantities. The material having passed through the feed-passage B, drops upon one end of a perforated bottom, C, through the perforations of which heated or dried air is drawn by an exhaust-fan, D, arranged on top of the cover A′ of the case. The air thus drawn through the perforated bottom, and through the grain or other material passed along over it, is heated in a chamber, E, in the lower part of the case, by the heaters F and the flue-pipes G, extending therefrom through the said chamber E, the exhaust-fan creating the draft by which it circulates through the grain, &c. This

heated air becomes charged with the moisture that it takes up from the grain, &c., and when expelled by the fan other heated air takes its place and becomes surcharged with moisture, and so on. The grain, &c., is stirred and advanced over the perforated bottom C, by means of adjustable arms or stirrers *b*, arranged on cross-shafts *c*, that are united at their ends to endless traveling chains or belts *d* at the sides of the case, these chains having guide-wheels *e e*, that run on ways *f* connected to the sides of the case, and also sprocket-wheels *g*, around which they move, the sprocket-wheels being on shafts *h*, whose bearings run in adjustable boxes *i*, so as to keep the chains properly strained up. On the outside of the case there may be a crank, *j*, or a pulley, *k*, through or by means of which and of a pinion on their shaft, motion is communicated to the cog wheel H, on one of the shafts *h*, and through this shaft to the endless chains and stirrers and movers thereon, for advancing and stirring the grain, &c. The stirrers, as more distinctly seen in Fig. 5, are composed of four arms, 1 2 3 4, hinged to each other and connected to the shaft *c*, and to a bar, *l*, so that by means of a set-screw, 5, the arms 3 4 may be moved apart or drawn toward each other, to present more or less moving surface to the grain or other material being dried, cooled, and cleaned; and these stirrers and movers may be run at a greater or less velocity for a similar purpose, viz., of advancing more or less rapidly the grain or other material over the perforated bottom and through the air-chamber. Any dirt, or other impure matter heavy enough to pass through the perforated bottom, drops or is conducted through the open space I by the inclined overlapping hopper or deflecting boards J, whence it can be removed through a door at the end of the case, while the dust or impurities that rise above the perforated bottom are drawn out by the exhaust-fan D, so that it is also a cleansing, as well as a drying and cooling-process.

The grain, &c., having been dried and passed over the bottom C by means of the stirrers and movers *b*, drops through the passage *m* onto a perforated apron, K, which is hinged at its upper end, as at *u*, and can be raised or lowered at its lower end by the swivel-rods *o o*. The object in raising and lowering this apron K, is to give the apron such an inclination only as will allow the grain or other

material to slide or move over it by its own gravity, and to hasten or retard it, as the case may be.

At the lower end of the apron K there are boards *p q*, furnished with openings, one of these, *q*, being so arranged by slots and set-screws as that it may be moved register-fashion upon the other, *p*, to open or close the passages through them, and thus limit the passage of the grain or other material through them. When the passages are closed, then the grain, &c., must pass over the top of the board *p*, and thence through the exit-passage *r* of the machine.

Underneath the apron K there is a cold-air chamber, L, into which the cool air is blown by a fan-blower, M, and thence this air rises up through the perforated bottom, and through the material passing over it, which cools it.

At the lower end and under side of the apron K there is a hinged valve, *s*, which rests against the part *t* of the frame. This valve, as the apron is raised or lowered, keeps the space under the apron closed, so that the only escape for the cool air out of the chamber L is through the perforations in the apron K.

The main chamber E is furnished with air through the openings *u*, Fig. 1, which are commanded by a register, *v*, to regulate the quantity introduced.

All the inlet and exit openings or passages are controlled by slides, valves, or registers, except that, *m*, which is not material; but even this may be commanded, if necessary, by a slide or valve.

Having thus fully described my invention, what I claim as new, and desire to secure by Letters-Patent, is—

1. In combination with the heated-air chamber E, perforated bottom C, and the stirring and moving arms traversing over it, the exhaust-fan D, for drawing the heated air up through the grain or other material, and through the machine, substantially as described.

2. In combination with the hinged apron K, overlying the cool-air chamber L, the raising and lowering rods *o o*, and hinged valve *s*, substantially as described, so that said apron may be raised or adjusted without opening the chamber L, as specified.

3. The stirring and moving mechanism, consisting, essentially, of the hinged and adjustable arms *b b*, moved by

endless chains, substantially as herein described, and for the purposes set forth.

4. In a machine for drying, cleaning, and purifying grain, meal, flour, and similar materials, the combination of a horizontal screen, forming a diaphragm within a rectangular air-tight case, an exhaust-fan and discharge connected with the upper portion of said case, a feed-hopper and regulator to feed the material into the machine the entire width of the screen, and of even depth, and means for agitating and moving the material in one direction, while the air drawn up by the fan passes in another direction, and hopper beneath said screen having inclined overlapping surfaces, all substantially as and for the purpose set forth.

JESSE B. WHEELER.

In presence of—

GEO. G. SUMNER,

J. S. LAWRENCE.

EXHIBIT "L."

Abstract of Bill filed in the suit of the American Middlings Purifier Company vs. John A. Christian, Cadwalader C. Washburn, and others, in the Circuit Court of the United States for the District of Minnesota.

Bill sets forth grant of original patetn, No. 37,317, 37,318, 37,321, to Cochrane and others; grant of reissued patent, No. 5,841; assignment to plaintiffs; the charge of infringement; and then proceeds:

And your orators further show unto your Honors that on or about the sixteenth day of November, A. D. 1875, the then owners of said reissued letters-patent, William F. Cochrane, William Warder, Rodney Mason, Charles F. Peck, John M. Van Buskirk, John O. Evans, Walter S. Cox, and William H. Philip, assignors to complainant as aforesaid, filed their certain bill of complaint in the supreme court of the District of Columbia against Josiah W. Deener *et al.*, alleging, among other things, the infringement of said reissued letters-patent, No. 5,841; that the defendants appeared and answered in said suit, and in their said answer denied the allegations of the said bill, and set up in further defence, prior knowledge and use by other than said Cochrane of the invention set forth and claimed in said reissued letters-patent, and that said Cochrane was not the original and first inventor thereof.

That issue was duly joined on said pleadings, and testimony was taken at great length by both the complainants and defendants, and that, after hearing counsel for complainants and defendants, the said court dismissed the bill.

That thereupon an appeal was taken to the Supreme Court of the United States, and said appealed cause was argued before said appellate court, and decided at the October term thereof, 1876. That by decision of said court it became *res adjudicata;* that said supreme court of the District of Columbia, sitting in equity, had jurisdiction of said bill; that said parties complainant were the owners of said reissued letters-patent; and further, that the defendants therein had infringed the said reissued letters-patent, upon which this suit is brought. That the said reissued letters-patent were good and valid in law, and were not

anticipated by any of the priorities set forth in said answer or in the evidence taken in said cause.

And these complainants aver and charge the fact to be, that the process used by the defendants herein is substantially the same as that used by the defendants in the said cause, held, as aforesaid, by the Supreme Court of the United States to have infringed the reissued letters-patent upon which this suit is brought.

Wherefore these complainants pray that the said defendants may answer the premises, but not under oath, their answer under oath, except as to the special interrogatories hereinafter mentioned, being expressly waived, and that they may also answer the following interrogatory:

Int. 1. The defendants are required to make answer to all and several the allegations of this bill, and especially they are required to fully disclose and set forth, under oath, a description of the process used by them in their manufacture of flour.

And these complainants further pray that the defendant may be enjoined during the pendency of this suit from such infringement.

That they may be perpetually enjoined from such infringement.

That they may account to the complainants for their use and practice in the manufacture of flour of the process used by them in violation of these complainants' said exclusive rights, and for all moneys received from the use and practice thereof, and may be decreed to pay over to the complainants any and all profits, gains, and advantages made and derived from this use and practice of said process, in violation of the complainants' said rights.

That they may be decreed to pay the costs of this suit.

And that damages to the amount of *three hundred thousand dollars*, to be assessed as by statute provided, may be adjudged to these complainants against the defendants for such violation of their said exclusive rights, and for their infringement, and for other and further relief, may it please your Honors to grant unto these com plainants.

Injunction order in above case.

United States Circuit Court for the District of Minnesota.
Term minutes, June Term, A. D. 1877. June 30, 1877.

THE AMERICAN MIDDLINGS PURIFIER COMPANY
vs.
JOHN A. CHRISTIAN, LEWELLYN CHRISTIAN, AND CADWALLADER C. WASHBURN, *Co-partners, under the firm name and style of* J. A. CHRISTIAN AND CO. } *In Equity.*

And now, at the general June term, 1877, of this court, holden at Saint Paul, in said district, their Honors Judges Miller and Nelson presiding, a motion having been duly made upon notice to the defendants, by the counsel for the complainant, for a preliminary injunction against the defendants, as prayed in the bill of complaint herein, and having been duly presented and argued upon the bill and affidavits presented by both plaintiff and defendants:

Now it is ordered that the motion of the complainant herein be, and the same is hereby, granted, and that a preliminary writ of injunction in this cause issue out of and under the seal of this court against the defendants in this action, restraining them and each of them, their officers, servants, agents, attorneys, confederates, workingmen, and employees from further infringing the process of manufacturing flour, charged in the bill of complaint herein to be invented by and patented to William F. Cochrane, and now owned by the complainant, as the same is described and claimed in reissued Letters-Patent No. 5,841, and that they and each of them stand enjoined from manufacturing flour by the process described in said reissued Letters-Patent No. 5,841, until the final decree in the above-entitled cause: *Unless*, within ten days from the service of this order upon the defendants, or their solicitor in this cause, Gordon E. Cole, Esq., the defendants shall execute to the complainant and file in this cause a bond, with good and sufficient sureties, to be approved by his Honor Judge Nelson, in the sum of two hundred and fifty thousand dollars; *Conditioned*, That said defendants, once in three months, shall and will render a true account, under oath,

and file the same with the clerk of this court, showing the amount of flour manufactured by them under the process in question during the pendency of this action, the final account to be rendered and filed on or before the first day of September next, and to include all flour manufactured by them as aforesaid since the commencement of this action; and *conditioned*, also, that the said defendants shall and will pay the complainant, its successors, and assigns, such sum of money as may finally be adjudged and decreed to be paid by them in this suit.

R. R. NELSON,
Judge.

—

UNITED STATES OF AMERICA, } *ss:*
District of Minnesota, }

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this 4th day of December, A. D. 1877.

[SEAL.] H. E. MANN,
Clerk.

Endorsement: United States Circuit Court, district of Minnesota. The American Middlings Purifier Co. *vs.* J. A. Christian and Co. Certified copy order for a preliminary injunction.

I certify that I was attended by the parties, by their counsel, at the times and place as stated in the caption and foregoing depositions, and by the said witnesses therein named, and that the said witnesses, being of sound mind and lawful age, were, before the commencement of the taking of their deposition, by me duly and publicly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause mentioned; and that the depositions as given were reduced to writing in the presence of such witnesses; and that the deposition of each witness, when completed, was read over by such witness and signed by him in my presence.

I further certify that the exhibits attached to the depositions, and marked Exhibits A, B, C, D, E, F, G, H, I, K, L, and Exhibit receipts 1 to 12, and those marked Complainants' Exhibits 1 and 2, are the ones referred to therein.

JAS. H. McKENNEY,
Examiner.